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William H. Sheppard

THE
TOUCHSTONE
OF
COMMON ASSURANCES
BEING
A PLAIN AND FAMILIAR
Treatise on Conveyancing.

BY **WILLIAM SHEPPARD, Esq.**
OF THE MIDDLE TEMPLE.

WITH COPIOUS NOTES,
AND
A TABLE OF CASES CITED THEREIN;
TO WHICH IS ADDED,
AN APPENDIX,
AND
AN EXTENSIVE ANALYTICAL INDEX.

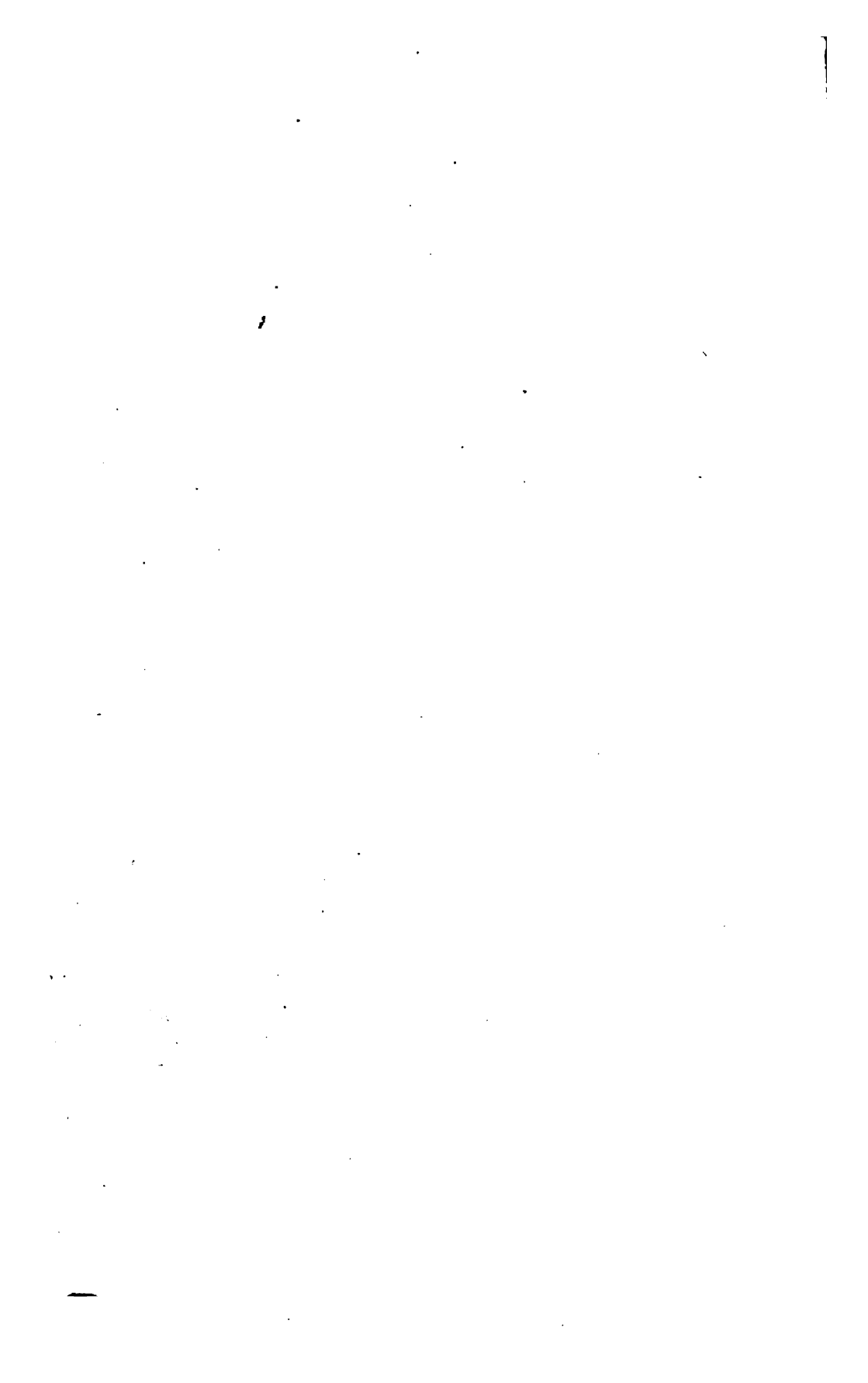
By **EDMOND GIBSON ATHERLEY, Esq.**
OF LINCOLN'S-INN, BARRISTER AT LAW.

THE EIGHTH EDITION,

VOL. I.

SAMUEL BROOKE, PATER-NOSTER ROW,
LONDON.

1826.



EDITOR'S

P R E F A C E.

THE high reputation which the Touchstone has so long maintained, renders it an almost indispensable part of a Lawyer's Library. As a systematic body of Law relating to Real Property, it is a Work particularly valuable to the Student.

It may, perhaps, be expected that some notice should be taken of what has been done to the present Edition. To say any thing about the *quantity* of the additional matter contained in it, would be quite superfluous;—the number of the notes and the copiousness of many of them, rendering it evident, that the additional matter is very considerable; and, from the smallness of the type in which the notes are printed, still more considerable than, from a cursory view, might be supposed.—How far indeed, the Editor's labours may be useful to the Profession, is not for him to determine.

It may be proper to observe, that he has taken a new, and it is hoped a more correct view, of several important points on the subject of Fines. The same may be observed with respect to Leases. He has fully noticed the subject of *Agreements* or *Con-*

PREFACE.

tracts for Leases; a subject on which little information, in an embodied shape, is to be met with in the professed treatises on Leases; yet a subject of great importance, from the circumstance of tenants frequently holding their farms, &c. under Agreements, and not under actual Leases. He has taken a view differing from any hitherto taken, of the subject of Protection against Judgments, &c. by means of assignments of terms of years and Conveyances of outstanding legal Estates; and he has endeavoured to elucidate the doctrine relative to Debts due to the Crown. He has entered fully into the important subject of voluntary and fraudulent Settlements, as they affect purchasers and creditors. The doctrine of Equity relating to deeds of confirmation, where their object is to confirm transactions tainted with fraud, undue influence, &c.; is fully entered into; as is the doctrine of Equity relative to releases of right:—Upon both these subjects, though important, the Editor believes there is not much information, in a collected shape, to be met with in any other publication. The notes on the chapters of Wills and Uses are numerous, and many of them copious; and some of them, it is hoped, will be found to throw additional light on the subjects to which they relate.

An Appendix is added; in which recent decisions on subjects treated of in the earlier chapters of the work are noticed; and the usefulness of the work is greatly enhanced by a copious Index. In the compilation of the Index, the Editor has to acknowledge the assistance he received from some of his

PREFACE.

pupils—the assiduity and ability with which Mr. R. Wilson rendered his assistance, entitle him to the Editor's best thanks.

In a Preface to the Second Part of the present Edition of the Touchstone, the Editor noticed the charge of plagiarism preferred against him by Mr. Preston; and replied to it in a way which, he has every reason to believe, convinced that gentleman, that the charge was unfounded. This slight notice of the subject the Editor cannot well avoid taking; but he contents himself with this; as it ill accords with his principles and disposition to keep alive unfriendly feelings.

GRAY'S INN SQUARE,
July 1, 1826.



ERRATA.

Page

- 14, n. (x), line 1, for "32 H. c. 28" read "33 H. c. 28."
 line 2, dele "and" before "yet."
 21, n. (g), line 3, for "ever" read "even."
 26, n. (l), for "feoffor" read "feoffee."
 42, n. (g), line 12, for "appoinement" read "appointment."
 42 †, n. (g), line 20, from bottom, for "Geo. 3" read "Geo. 2."
 42 §, line 10, add "it" before "it is presumed."
 43, n. (t), line 2, read "11 Hen. 7."
 49, n. (f), line 31, for "10 & 11 Wm. c. 4" read "10 & 11 Wm. 3, c. 14."
 53, n. (i), line 8, for "feoffor" read "feoffee."
 54, n. (m), line 18, for "present" read "parent."
 56, n. (y), line 4, dele "is."
 66, n. (s), line 14, for "Mod." read "Madd." and add "*Batterbes v. Farrington*, 1 Swanst. 106."
 66 §, note, line 2, dele "have."
 77, n. (e), line 24, for "transaction" read "transactions."
 line 58, for "form" read "from."
 79, n. (n), line 6, for "number" read "member."
 86, n. (d), line 38, for "sale" read "sell."
 111, dele "(s)," both in the text and note; and in the latter substitute "(t)," and dele "(t)" at the beginning of the second section of the note.
 114, n. (d), line 1, for "c. 2" read "c. 3."
 116, n. (h), line 1, for "c. 2" read "c. 3."
 120, n. (g), for "c. 2" read "c. 3."
 160 *, last line but one, for "will never go so far as to extend" read "will never so far extend."
 165, n. (c), for "160" read "161."
 222, n. (m), last line, for "of a grant of a reversion, or as feoffment" read "or as a grant of a reversion, or as a feoffment."
 270, n. (e), line 6, for "bargain or sale" read "bargain and sale."
 270 §, line 1, for "these" read "there."
 270 ¶, line 6, for "considered in lands" read "considered as lands."
 270 † †, line 9, for "lessee" read "lessor."
 270 §§, n. (a), line 16, for "lessee's" read "lessor's."
 271, last line but one, for "lessor signed his name," read "lessee signed his name."
 271 *, last line but two, for "assuring" read "agreeing."⁵
 271 †, note, line 27, for "part of the lessor" read "part of the lessee."
 272 *, note, line 10, dele "only."
 272 †, note, line 31, transfer the words "laying out" to the end of the following line.
 272 §, note, line 15, for "perty" read "party."
 272 † †, last line but six, for "meaning" read "making."
 279, note (g), line 5 from bottom, after "39 & 40 Geo. 3" add "c. 41."

E R R A T A.

Page

- 284 ¶, line 23, add "a" before "doctrine."
 note 9, line 9, for "did take" read "did not take."
 287, n. (p), for "necessary" read "unnecessary."
 ... n. (q), line 1, for "page 30, notes (m) and (o)" read "page 41, note (n)."
 289, n. (y), for "page 46, note (n)," read "page 41, note (n)."
 300, n. (d), line 4, for "under-lessee" read "under-lease."
 last line, for "them" read "it."
 301, n. (e), line 5, for "(or lessee)" read "(or assignee)."
 383, n. (a), line 5, for "merge an," read "merge in an."
 322, n. (g), line 3, for "found," read "bound."
 ... n. (n), line 7, for "act in pais" read "matter of record."
 324, n. (x), line 10, for "to a corporation" read "by a corporation."
 327, n. (t), line 1, for "remainder in reversion" read "remainder or reversion."
 334, n. (u), last line but one, for "abserve" read "observe."
 336, n. (l), line 7, for "remainder-man" read "remainder-men."
 346, n. (a), line 13, for "302" read "303."
 366 h, line 20, add "it" before "may clearly."
 366 i, line 34, add "but" after "regarded."
 366 m, line 20 from bottom, add "of" before "their lands."
 366 q, line 28, add "as" before "it has."
 366 r, line 34, for "c. 29" read "c. 39."
 388, last line of text, after the word "condition" add "or the thing to be done by the condition."
 406, n. (k), line 6 from end of the note, for "c. 2" read "c. 3."
 409 a, note, lines 2 and 3, for "page 306, note (l)" read "page 406, note (k)."
 409 i, line 5 from bottom, add "by will" after "such a power."
 421, n. (l), line 4, for "c. 193" read "c. 192."
 437, n. (p), for "page 432" read "page 422."
 451, n. (z), line 1, for "devisor" read "devisee."
 452, n. (g), last line, for "particular case" read "particular estate."
 ... n. (h), for "page 440" read "409 i."
 ... n. (k), last line, for "page 443 d" read "page 434 d."
 468, n. (n), for "c. 2" read "c. 24."
 486, read "note (c)" for "note (b)," and read "note (b)" for "note (c)."
 488, n. (g), for "406" read "486."
 490, n. (l), line 2, for "note to page 447" read "note (k) to page 467."
 ... n. (p), for "note (u)" read "note (m)."
 496, n. (k), line 10, for "advowson" read "next presentation."
 504, text, line 32, after "cestuique" add "use."
 506, text, line 16 from top, for "by" read "be."
 ... n. (e), line 6, for "then" read "than."
 524, text, line 33, for "o" read "n."

Such Errors as have been found in the Names of Cases or Reporters, are corrected in the Table of Cases.

(DEDICATION TO THE ORIGINAL EDITIONS.)

TO
THE RIGHT WORSHIPFUL
THE
BENCHERS OF THE MIDDLE TEMPLE,
AND TO THE REST OF THE
GENTLEMEN OF THAT SOCIETY.

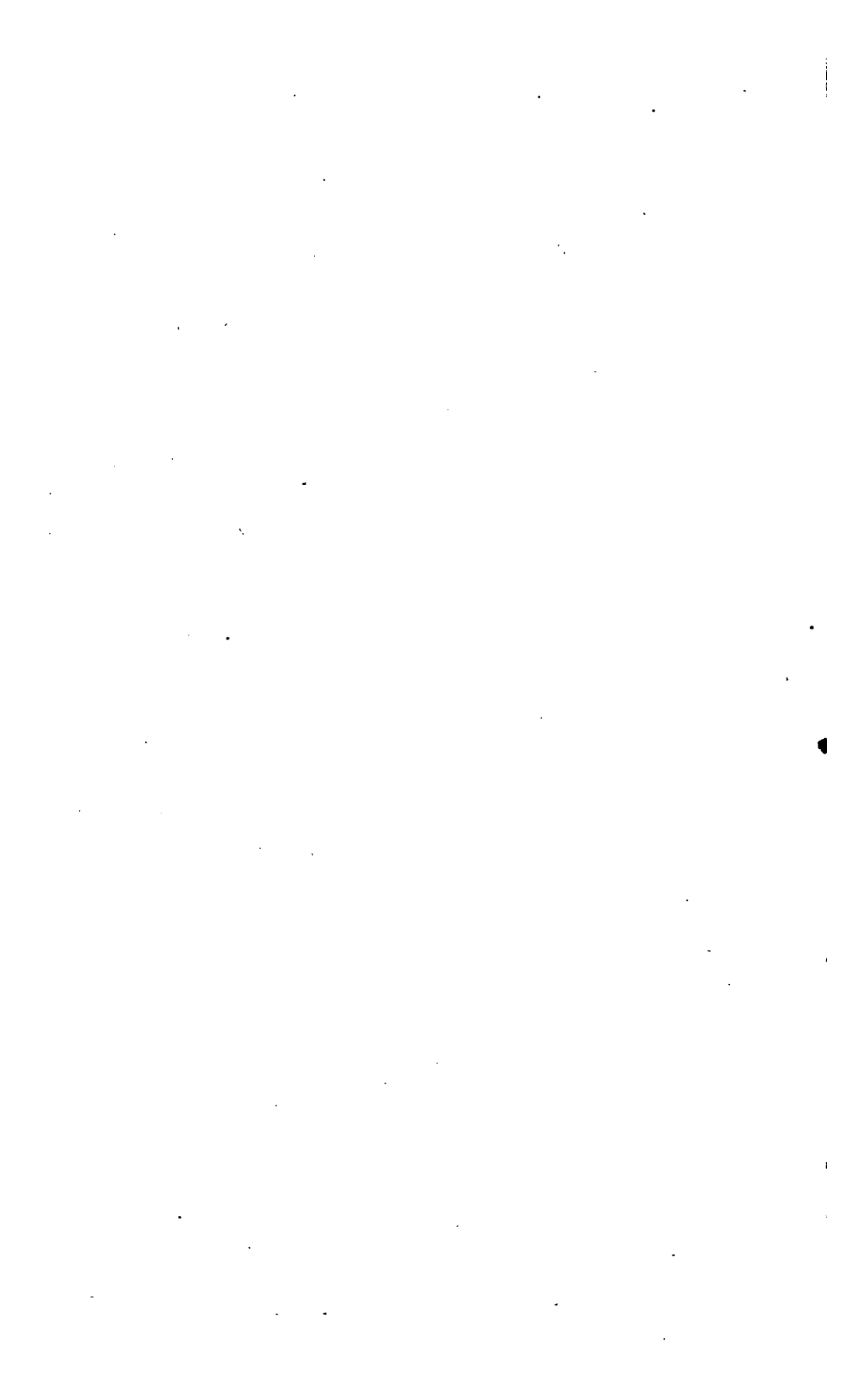
GENTLEMEN,

I MAY perhaps have been so long out of your sight, that I may be also by this time out of your mind. Nevertheless, it is not out of my mind, that I having received the seed and growth of that little knowledge in the laws of this kingdom which God hath given me in the seed-plot of your ancient and honorable SOCIETY, do no less (by a natural equity) owe the fruit thereof to you, than the rivers do their tribute to the ocean, and the trees their fruit to the planters and pruners. This therefore (such as it is) although unworthy of so great a name, I am bold to dedicate to you, and put forth under the shelter of your favorable wings; beseeching you to accept thereof, and my well meaning therein, and to honor it with your patronage and countenance, and it will much oblige,

Gentlemen,

Your most humble Servant.

W. S.



ADDRESS

TO THE

PUBLIC,

(PREFIXED TO THE FOURTH EDITION.)

THE fate of the book, now reprinted, has been somewhat singular. For a long time the *Touchstone* lay on the stalls of the second-hand booksellers in *Moorfields* unnoticed, and of no repute. The late Lord Chief Justice *Willes* was the person who rescued it from unmerited neglect, by the high character he gave it in the court where he presided: His powerful encomium, together with the importance of the subject-matter of the book, the method observed in it, and the authorities upon which its doctrine is established, have contributed to give the work that reputation which is fully confirmed by its present scarcity.—Though this treatise bears the name of *Sheppard*, yet doubts have arisen whether it be really his performance; if we consider that this was given as Mr. *Sheppard's* first publication, and compare it with his subsequent productions, the earliest work will be found to bear the marks of the maturest judgment. This circumstance, together with the report which has prevailed even to this day, that he is not entitled to the credit he has assumed, seems to justify the doubt; and the assurances made by the friends of the late Judge *Doderidge*, that the manuscript, so congenial to his abilities, was found among his papers, favor the supposition long entertained, that Mr. Justice *Doderidge* was really the author of the *Touchstone*.—From a printed copy of this work, which belonged to that very eminent conveyancer, the late Mr. *Booth*, and is now in the possession of Mr. *Holliday*, of *Lincoln's-Inn*, the Editor has been permitted, for the information of the curious reader, to transcribe the following note, written in Mr. *Booth's* own hand in the title-page, “No part of this book is *Sheppard's* but the Title, for it was originally wrote by Justice *Doderidge*, whose library *Sheppard* purchased, where, among other books, he found the original manuscript of this treatise, and afterwards published it as his own. Sir *Creswell Levinz* had seen the manuscript in Justice *Doderidge's* hands, and from him, Mr. *Pigott*, who was my author, had this information.”—A report, propagated by persons so respectable, amounts almost to a certainty.—Be this as may, the credit of the work is now so well established, that, were its presumptive lineage indisputably proved, it could not easily increase in reputation.—Mr. *Pigott*, the author of the celebrated *Treatise on Recoveries*, had so just a sense of the merit of the *Touchstone*, that he took the pains to compile a copious and correct index thereto, now first published, but with some additions. The signal, in Mr. *Pigott's* own hand-writing, is also in the possession of the gentleman

ADDRESS TO THE PUBLIC.

man above named.—It is not within the bounds of this address, nor the intention of the Editor, to specify the various subsequent writers who have availed themselves of the *Touchstone*, by making liberal extracts therefrom, though they have not had the gratitude to acknowledge the source of their information. Those who will take the pains to compare any of the chapters in this work, with later treatises on the same subjects, will find the truth of this observation, which is intended rather to mark the authority of this book, than to depreciate that of others.—On a thorough examination, it is presumed this work will be found to contain as excellent a *Theory of Conveyancing* as any extant; it is therefore now printed on the same sized paper with *Horseman's Precedents*, in order that such gentlemen in that particular branch, who incline to the opinion just mentioned, may, by adding this volume to those precedents, form a complete body of conveyancing.—The universal esteem in which the *Touchstone* has been held, not only by conveyancers, but by the profession in general, principally induced the Editor to reprint it.—The humble merit of an Editor is chiefly confined to correctness; in endeavouring to attain which, he found it necessary, after the third chapter, to alter the old orthography, by omitting the “e” final, which in the former editions was sometimes inserted and sometimes omitted in the same word, even where it happened to be repeated in the same period.—The public will not require an apology for being presented with what has been long wanted, a new edition of so valuable and excellent a work: but an apology is due from the Editor for submitting to the inspection of the learned, though not without the approbation of some friends, the few notes which he has ventured to subjoin, and which originally were intended for his private use.—He assumes to himself no merit from this addition; but as the law, and particularly this branch of it, has received many material alterations and improvements since the last edition of this work, it is now become the duty of an Editor to endeavour to point out the most important of such changes:—he is therefore led to hope, that the student may find among the notes, some that are useful.—It has been his chief aim to make them clear and concise, and to render them serviceable by referring to the general books on the subject, and occasionally to cases and statutes.—He does not pretend to have compared the numerous references of the original, though there are some which he has occasionally rectified; but he has endeavoured to be peculiarly attentive to the correctness of those he has added.—Though no pains or attention have been spared to render this edition as correct and useful as possible, yet the Editor is convinced, from the consciousness of his own inability, and the extensive variety of matter comprehended in this work, how much he stands in need of the utmost candour of the public.

EDWARD HILLIARD.

Lincoln's-Inn,
12th Jan. 1780.

PREFACE

TO THE

ORIGINAL EDITIONS.

TO THE READER.

COURTEOUS Reader, I do desire in all plainness to be understood, that having, in the time of my study of the LAWS of this Realm, collected some confused NOTES and OBSERVATIONS out of the same: and being afterwards willing (for God knows I had no further end or aim at first in them) for mine own private help and better readiness, to digest them into some order and method, such as my understanding could best contrive. The which things, thus prepared and lying by me, came by chance to the view of some more learned than myself, who seemed to give some good approbation thereunto. Whereupon I first of all began to bethink myself of making some part thereof public. And having to that purpose advised with some of my more judicious friends, and being encouraged by some, and not discouraged by others, I did at last resolve to attempt to publish and put in print the same. And calling to mind that the COMMON ASSURANCES and CONVEYANCES of the Kingdom (whereupon the whole estates, and consequently the livelihoods, of very many depend) are matters of great importance, and that concern most men; and that therefore the legal learning thereof must needs be of great and daily use. And considering withal the mischief arising every where by the rash adventures of sundry ignorant men that meddle so much in these weighty matters, there being now almost in every parish an unlearned, and yet confident, pragmatistical attorney, (not that I think them all to be such,) or a lawless scrivener, that may perhaps have some law books in their houses, but never read more law than is on the backside of *Littleton*, or an ignorant vicar, or it may be a blacksmith, carpenter, or weaver, that have no more books of law in their houses, than they have law in their heads, and yet as apt and able (if you will believe themselves) either to judge of a conveyance, and by the rules of law (of all which they are utterly ignorant) to determine

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determine of the strength and goodness of a title or estate already made, or to make a conveyance to transfer the property of things from man to man, as the most learned and best counsellor of them all; and therefore undertake with great confidence, and dispatch without any scruple, any business whatsoever offered to their hands: wherein they deal with men in their estates, as many that are called physicians (but in truth empiricks) deal with men in their bodies, (an evil, fit for the consideration of Parliament). How they come to this their supposed dexterity and skill is a wonder, except that saying be false, *Nemo nascitur artifex*. Either it must be born with them, or they must have it by education, or they must not have it at all. But if they will tell me they have good precedents, I will tell them that a good conveyancer must be as well able to judge of the validity of the title, and primitive estate of him that is to convey, (which a man can never do without knowledge of the rules of law, no more than a blind man can judge of colours,) as to make a derivative estate and conveyance by a good precedent; for *scire est per causas scire*, as the philosopher speaks. And as well, for aught I know, may a man be an able physician by certain medicines only, that never read so much as the grounds of physic, as such men be able conveyancers by their precedents only, that never read so much as the maxims of law: *Nullum medicamentum idem est in omnibus*. For my part I must ingenuously profess that I can scarce look into a title or meddle with a conveyance of weight, wherein I cannot make and move more doubts and questions, than I am able to resolve and answer; and therefore these men have gotten the start of me much. And yet much marvel it is to see how these empiricks of the law (if I may so call them) are sought unto and made use of, and that not only in lesser, but oft-times in greater and more weighty businesses, and that without the assistance of any others more able and sufficient; the which is not for lack of opportunity of finding more learned men in the law, for there is a sufficient store of them in all places: nor do those that employ these empiricks of the law, always save (if they think it saved) money hereby; for, besides the great mischief which is oft-times done themselves by the unskilfulness of these workmen, some of them by reason of their much custom are grown more chargeable than an ordinary counsellor, whose fee is certain and known. But of these empiricks of the law and those that make use of them, I might say, as sometime our blessed Saviour said, *Let them alone, the blind leaders of the blind*. Howbeit, being now called (as I conceive) hereunto, I choose rather to admonish them, and to tell the first sort, that I conceive them to be usurpers upon, and intruders into, other mens' callings, and that they thrust their sickles into other mens' harvest, and that they have not yet learned that rule of divinity, *To abide in the calling wherein they are called*, but exercise themselves in things to high for them; nor yet have they
learned

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learned this, *Ne sutor ultra crepidam*, Let not the cobbler go beyond his last; nor have they learned that, *In quo quisque norit in hoc se exerceat*; and let me tell the latter sort, that they heed not enough this saying, *Caveat Emptor*; nor believe that saying, *Cuique in arte sua credendum*, That every man is to be believed in his own art. But if you will say to me, that these men do their work well, and their work doth succeed well; I will say to you, that the blind may happily hit the mark; and it may fall out that sometimes they do their work well, and it doth succeed well, but oft-times woeful experience sheweth the contrary, and that many men have been much mischieved every where by the ignorance of these men. Wherefore I wish both sorts of them to doubt more, and to be well advised in these affairs, as the law doth presume every one will be; for therefore is it indeed that a will hath a more favourable interpretation than a deed, because mens' wills are oft-times made in haste, and it is presumed men take who they can to make them; but men for the making of their deeds are not put upon those straits, but they take advice of learned men therein. And the more to move men herein, and to redress the evil before discovered, I have herein set forth, under certain general titles or common places, the greatest part of the judgments, statutes, resolutions, and cases, that do contain or concern the learning of the COMMON ASSURANCES of the kingdom; so as I think I may truly say, under reformation, that there are few material things, as touching this subject, to be found any where dispersed in the volumes of the law, but they are to be found somewhere herein; and that there shall not happen one case of a hundred, but a hundred to one the diligent reader may here find the case itself, or some case that by good inference may be applied to it. Not that I would have men now to rest upon this help, and be less careful, and more careless to take advice of the lawyer than heretofore, (for this is the disease I labour to cure,) for although it may be that hereby these matters are made in some measure conspicuous, yet to say the very truth, besides that the subject-matter of law is somewhat transcendant, and too high for ordinary capacities, the manner of putting of cases is so concise, the distinctions and differences of law are so many, that it is hard for any man, not well read in the laws in general, to judge or make use of any part of them in particular, and rightly and fully to apprehend and apply the things herein set forth: and therefore I dare not advise men to rest altogether hereupon, nor can I forbear to tell them it is very dangerous so to do. But my aims and ends, being also the uses and commodities I expect and look after from this work, are, first of all, that such men, before spoken of, may see by the view of the infinite variety of cases, points, and questions, as touching these matters, discovering also so many by-ways wherein men conversant therein may walk, how much there goes to making up of an able conveyancer, and that

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PREFACE TO THE

it is not so easy a matter to judge of a title, give advice upon a Conveyance, and make these Common Assurances, as men dream of, and that therefore men learn more to suspect themselves and others herein; and to these it may serve as a light in a dark place. Secondly, that by this the lawyer and student may in some measure readily find together what he desires touching these matters; and to him it may serve for a table or remembrancer. And lastly, that every man may be the better able, by the help thereof, to understand, open and put his own case to his lawyer, and to move more pertinent questions to him: and other uses I would have no man to make of it. In the use of this work therefore I must give thee two advertisements or caveats: First, that if thou desire to find any thing in particular therein contained, that thou read the whole chapter, or at least the whole question and division of the chapter, wherein that thing is contained. And secondly, that thou dost not confidently build and rely upon any thing therein alone without advice from the learned lawyer also, or at least without a serious and judicious perusal of the authorities and books themselves to which thou art therein referred: *Melius est petere fontes quam sectari rivulos*. Some other things there are also here inserted, as falling aptly under the title, albeit they be not altogether pertinent to the subject-matter. And all these sweet flowers of the law, growing *sparsim* in the great fields of the volumes of the Common and Statute Laws, have I thus painfully gathered, bound up, and commended to thy charitable censure: no doubt but, in my desire to grasp and take up so much, I have taken and bound up some grass withall, which I hope shall not offend. If so be that I find it have a fragrant smell with thee, I shall think I have recompense enough for my pains. But if any man think me too presumptuous to attempt this enterprise, let him know first, that there is nothing of mine in it but the method, (and that not mine neither altogether,) the matter thereof being nothing else but the judgments, resolutions, and opinions of the Judges of the law in succeeding times: and then as I have not trusted myself, so they shall not trust me altogether in these things. For I do freely acknowledge mine own weakness and want of judgment, and that I am the unmeetest and unworthiest of all men to undertake such a work, not one of a thousand, but the meanest of ten thousand. And this I have done is a poor something sufficient only to give them that are more learned, occasion to do something more exactly in this kind. If any man dislike the publishing of it in the English tongue, and think perhaps it may make the law to be the more despised, and the practitioner of the law the less regarded and used, I do wonder at the dislike of such a man: for to me there appears no more reason why to keep the laws in an unknown language that they may be kept from the knowledge of the people, than papists have to keep the scriptures and their prayers in a language unknown to the people; these being the laws by which the people are to be governed, and the law being the
best

ORIGINAL EDITIONS.

best inheritance of the subject. The wisdom of the Parliament hath thought fit to commend all the statute laws to the people in English, and to appoint that the pleadings should be in English. And have we not many books of law in English already, as *Littleton's Tenures*, *Doctor & Student*, *Finche's Law*, Justice *Doderidge's Treatises*, *Coke upon Littleton*, the *Woman's Lawyer*, and many others? and are not these useful and profitable? and besides the greatest part of the proceedings in Chancery (the court of greatest employment within the Kingdom) are in English. And if it be meet any part of the law be in the native tongue, it should seem it is meet this part should be so, because it concerneth so many men, and them also so much, that they may see and understand somewhat in their own evidences. And therefore as we have turned their deeds from Latin to English, so let us also turn some of the law touching these deeds out of French into English. *Bonum quo communius eo melius*. And I see no reason why in law more than in physic the discovery of the art should make the art or artists the less regarded. But (under correction) I should think that it will rather make them both the more esteemed, as a jewel whose properties are known, and that it will make them the more, and other men we have before spoken of the less, to be used and employed in their affairs; for the more men know, the less they think they know, and the more they doubt; and nothing moves men to be so bold and confident in these matters as their ignorance, according to the proverb, *Who so bold as blind Bayard?* And for further answer to this, I wish men to see the preface of the Lord *Coke upon Littleton*. And if any man have any thing else to object and except, (for some there are that will neither put forth their own strength to do good, nor bear with others that do so,) I wish them to undertake the same subject, and to perfect and supply my defects. And so committing thee to God, and this work to thy favourable censure,

I am, thy true friend,

W. S.



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CHAPTER XXIV.

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<i>W. (Doe, dem. of) v. Lea.</i>	26, n. n	— and <i>Lacy.</i> 1 <i>Salk.</i> 568	175, n. r
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<i>W. v. Heslittine.</i> 2 <i>B. & P.</i> 560	53, n. l	— <i>v. Owens.</i> 2 <i>Ves. jun.</i>	409 f, 409 h
— and <i>Smith.</i> 1 <i>Vent.</i> 130	160, n. b	595	35, n. i
— <i>v. Whitall.</i> 2 <i>Freem.</i> 9	372, n. o	141	358, n. k
— and <i>Wright.</i> 1 <i>Campb.</i> 163	230, n. r	<i>Willingham v. Joyce.</i> 3 <i>Ves.</i> 168	272 **
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<i>W. and Partridge.</i> 4 <i>T. R.</i>	372, n. o	— and <i>Portman.</i> <i>Cro. Eliz.</i> 386	97, n. r
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THE
TOUCHSTONE
OF
COMMON ASSURANCES.

CHAP. I.

OF COMMON ASSURANCES IN GENERAL.

THE common or general assurances or conveyances of the kingdom (being that by which commonly the property of things is made or changed) are of two sorts, or are made two manner of ways, viz. either by matter of record, or by matter of deed. Those that are made by matter of record, also, are made either by matter of record of a more high nature and extraordinary way, or by matter of record of a more low nature and ordinary way. Those assurances that are made by matter of record of a more high nature, are such as are made by act of parliament, of which we intend not to treat at all, neither do we intend to meddle with those assurances that are made by the king unto his subjects, as being matters more transcendent and intricate (a); but, those we intend to treat of are only the common assurances or conveyances that are made between subject and subject, and are of ordinary and daily use for the transferring of the property of lands, tenements, and hereditaments from one man to another. And of these there are observed to be ten kinds; two whereof are made by matter of record, as a fine, which is said to be a feoffment of record, and a common recovery, which is in the nature also of a feoffment of record; and the rest are by matter of deed; as first, by feoffment; secondly, by grant; thirdly, by bargain and sale, by deed indented and inrolled; fourthly, by lease; fifthly, by exchange; sixthly, by surrender; seventhly, by release or

* P 2.

(a) It may not be improper to say a few words on the subject of grants or assurances made by the crown. No estate of freehold can be conveyed by the crown but by matter of record. Doct. and Ind. b. 1. d. 2. The construction of a grant from the crown differs materially from the construction of a conveyance from one subject to another. A grant or conveyance by a subject is construed as far as possible in favor of the grantee; but a grant from the king *at the suit of the grantee*, is always expounded in favor of the crown. Where, indeed, the grant is expressed to be *of the special favor of the crown*, and not at the instance of the grantee, there it receives a construction more favorable to the grantee. Since the act, however, which restrains the crown from alienating its possessions for more than three lives, or thirty-one years (1 Ann. stat. 1. chap. 7. sect. 5.), the doctrine relative to grants from the crown has become less important than it previously was. Advowsons, indeed, estates forfeited for treason or felony, or seized into the hands of the crown upon outlawry, or taken in execution for debt due to the crown, are excepted out of the operation of the act; as are also grants of freeholds. See also the act of the 39th and 40th of Geo. 3. ch. 88, relating to estates of the king released out of the privy purse.

confirmation, both which are in nature of grants; eighthly, by devise, or by last will and testament. And some of these also serve to transfer the property of other things, as well as of lands, and some of them also have other operations and uses, as well as to change and alter property, and pass things from one man to another, as will appear in their proper places. And the first thing we shall begin upon, shall be the learning of a fine and common recovery; and first, of a fine.

CHAP. II.

OF A FINE.

Fine, *quid*.

THIS word is ambiguously taken in our law; for sometimes it is taken for a sum of money or mulct imposed or laid upon an offender for some offence done, and then also it is called a ransom. And sometimes it is taken for an income, or a sum of money paid at the entrance of a tenant into his land: and sometimes it is taken for a final agreement or conveyance upon record, for the settling and securing of lands and tenements; and in this sense it is taken here, and so it is defined by some to be, an acknowledgment in the king's court of the land, or other thing, to be his right that doth complain: and by others, a covenant made between parties, and recorded by the justices: and by others, a friendly, real, and final agreement amongst parties, concerning any land, or rent, or other thing, whereof any suit or writ is hanging between them in any court: and by others, more fully, an instrument of record of an agreement concerning lands, tenements, or hereditaments, duly made by the king's licence, and acknowledged by the parties to the same, upon a writ of covenant, writ of right, or such like, before the justices of the common pleas, or others thereunto authorized, and engrossed of record in the same court, to end all controversies thereof, both between themselves which be parties and privies to the same, and all strangers not suing or claiming in due time (b). And in every fine there is a suit supposed, wherein

Terms of the law, tit. Fine. Co. Lit. 126, 127, 120. Plow. 357. West. Symb. par. 2. chap. 1.

(b) Lord Coke defines a fine to be, a *feoffment on record*, whereby a freehold may pass by the common law without any livery of seisin. Co. Litt. 50. In *Hunt v. Bourne*, 1 Salk. 339, the court at king's bench, however, denied a fine to be a feoffment of record, and said it was improperly so called, but that the meaning was—"that it had the effect of a feoffment to some purposes, if he that levied the fine was seized of the freehold at the time of the fine levied:" and in *Smith*, on the demurrer in *Dormer v. Packhurst*, Lord Chief Justice Willes objects to Lord Coke's definition, and opposes to the authority of Lord Holt and Lord Macclesfield, viz. "that a fine is a feoffment upon record, where the party has such an estate as will entitle him to levy a fine, that is, an estate of freehold." 3 Atk. 141. According to Mr. Justice Blackstone (in the second volume of his Commentaries, §. 341) a fine may with more accuracy be called an *acknowledgement of a feoffment on record*. But this definition, whether we consider it as applied to fines generally, or to any particular species of fine, has a better claim to accuracy than Lord Coke's. This will be evident from a brief view of the nature and application of the different kinds of fines. The most common species of fine, is the *fine consummatione de droit come ceo*, &c. In this fine the consor acknowledges the estate to belong to the consee, as being of the antecedent gift of the consor. It is applied to estates either of freehold fee-simple; and either in possession, remainder, or reversion. When levied of an estate of fee-simple

wherein the party that is to have the thing is called the plaintiff, and sometimes also in another respect the conusee or recognissee; and the other that doth depart with the thing, is called the deforçant(e); and sometimes, in another respect, the conusor or recognisor. And it is therefore said to be, *finalis concordia, quia finem ponit negotio, adeo ut neutra pars litigantium ab ea de cetero possit recedere*. And it was anciently the end of a suit indeed; for after there had been some contention about the thing by suit, the parties became agreed who should have it, and so a fine was levied of it, and there was an end of the matter; and hence it is said to be *fructus* or *effectus legis*, *because it gives a man the fruit or effect of his suit. And to this day, therefore, a writ doth always go forth before a fine can be levied; and this is now one of the common assurances of the kingdom.

Conusee or recognissee, conusor or recognisor.
Deforçant.

* P. 3.

Co. 5. 58. 43.
Stat. 5 H. 4.
c. 14.

There are five essential parts of a fine. First, the original writ taken out against the conusor, for without this a fine cannot be levied(d). Secondly, the king's licence for the levying of the fine, and for this the king is to have a fine or sum of money, which is called king's silver, for this is properly that money which is due to the king in the court of common pleas, in respect of a licence there granted to any man for passing a fine; and this is part of

The parts of it.

King's silver,
quid.

or freehold in possession, it may, perhaps, without much inaccuracy, be called the acknowledgment of a feoffment upon record; because it acknowledges a former gift by the conusor to the conusee; and such gift might have been (and during the simpler times of our legal jurisprudence most probably was) made by feoffment. But where this species of fine is levied of a remainder or reversion, expectant upon an estate of freehold, or of any other estate or interest of which a feoffment cannot be made, there the inaccuracy of Mr. Justice Blackstone's definition must be perfectly obvious.

A fine *sur concessit* et *render*, like a fine *conusee*, acknowledges a right in the conusee as of the gift of the conusor. Like a fine *conusee* it may be levied of an estate either in possession, remainder, or reversion; but it has a property peculiar to itself, which is, that the conusee may grant back an estate to the conusor, or limit an interest to a stranger.

As this species of fine (though now seldom used) may be levied of a remainder or reversion expectant upon an estate of freehold, it must be obvious that it is not strictly accurate—to call it the acknowledgment of a feoffment upon record; for it is well known that a feoffment cannot be made of a remainder or reversion expectant upon an estate of freehold.

A fine *sur concessit de droit tantum* merely acknowledges a right in the conusee, but without saying how such right arose; and being generally levied of a remainder or reversion, it must be evident that Mr. Justice Blackstone's definition cannot, with any regard to accuracy, be applied to it. His definition appears to be equally inapplicable to a fine *sur concessit*, which is mostly levied in order to limit an estate for life or years; and as it acknowledges no anterior right in the conusee, it can never be said to be the acknowledgment either of a feoffment or any other species of conveyance.

(a) Deforcement may be grounded on the non-performance of a covenant real; and therefore, in bringing a fine of lands, the person against whom the fictitious action is brought, upon a supposed breach of covenant, is called the deforçant. 3 Bl. Com. 174.

(b) Since the statute de modo levandi fines (18 Edw. 1. stat. 4.) a fine cannot be levied, as it might have been at one time, except upon a suit actually commenced. The suit must be commenced by original writ; and if the writ is countermanded by a retraxit, a valid fine cannot afterwards be levied upon it. A fine however levied upon such a writ is not actually void, but is merely voidable. Co. Read. 10. 2 Inst. 513. Bro. Abr. tit. Fine, 82. If any of the parties to the writ should die before it is made returnable, the fine, so far as respects the parties dying, will not be good (a), as the foundation of an intended fine could not be prosecuted. But the act just now has altered the law, and no writ or suit now abates by the demise of the crown. The tests of a good original writ must not be on a Sunday or any other day that is *die non juridicus*.

Concord, *quid*. the revenues of the crown(e). Thirdly, the consuance or concord itself, which is the very agreement between the parties that intend the levying of the fine, how and in what manner the thing shall pass, and doth begin thus: *Et est concordia talis, &c.* and this is the foundation or substance of the fine (*f*); for if upon this the king's silver be entered, albeit the consuser die afterwards, yet the fine is good, and the note or foot of the fine are but abstracts out of this. Fourthly, the note of the fine, which is an abstract of the original contract or concord, and doth begin thus, *Inter A. querentem & B & C. deforciantes, &c.* Fifthly, the foot of the fine, which doth begin thus, *Hæc est finalis concordia, &c.* and containeth all the matter, the

Note of the fine, *quid*.

Foot of the fine, *quid*.

(e) The king's silver is the fine paid to the king for his licence, to compromise or accommodate the suit. The parties to the suit are, of course, all supposed to be living at the payment of the king's silver, for no compromise can take place if any of them are dead. If therefore any of them should die before the payment of the king's silver, or rather before the payment of it is recorded in the king's silver office, in that case the fine cannot be further proceeded in. This however must be understood with some qualifications. If there are two or more consusers, and one of them happens to die before the entry of the king's silver, the fine may nevertheless be proceeded in as to the surviving consusers. *Ersfield's case*, Hob. 329. *Cotton v. Barley*, Barnes, 215. So in the case of a fine levied in vacation, where the writ of entry is made returnable as of a preceding term (which it may be in the court of common pleas), there the death of any of the parties before the entry of the king's silver will not affect the validity of the fine provided it is afterwards entered *as of a day prior to the party's death*. *Farmer's case*, Hob. 330. *Dyer*, 220 b. *Anon.* 2 Vent. 47. *Hall and Cook*, 3 Mod. 140. *Barber v. Nunn*, Barnes, 218. If indeed any of the parties die before the entry of the king's silver, and, before its entry, a caveat is entered, in that case the entry of such caveat will prevent the entry of the king's silver; and will consequently prevent the operation of the fine. *Barber v. Nunn*, *supra*. (The case of *Hamies v. Mucklethwaite*, Barnes, 214. contra and not law.)

It will be proper to observe, that the king's silver, so far as its payment concerns the operation of a fine, is not considered as payable till the return of the original writ: for though it is now payable by virtue of the act of the 32 Geo. 2. c. 14. upon suing out the writ, yet as the act was merely to facilitate the collection of the king's silver, and contains an express clause that the operation of fines, levied in the court of common pleas at Westminster, shall not be altered except as directed by the act; and the act directing no alteration in their operation, the king's silver, so far as respects the operation of a fine, is still considered as not payable until the return of the original writ. Being payable, as we have seen, for leave to accommodate the suit, and not being considered as payable at the soonest, until the return of the original writ, such accommodation cannot be supposed to take place until that time; and consequently if any of the parties die before the return of the original writ, the fine, as to them, would be bad. *Precedent in Ch.* 150.

Where a fine is levied in vacation, upon a writ returnable as of a preceding term, the death of any of the parties before the entry (or record of the payment) of the king's silver can rarely happen; for the act just noticed directs it to be paid upon suing out of the original writ, and it being a usual practice to make an immediate entry of its payment in the king's silver office, such entry is almost sure to be made whilst the parties are all living; so that a fine levied in vacation, on a writ returnable as of a preceding term, can hardly ever be bad, on the ground of any of the parties dying before the entry of the king's silver. See *infra*, p. 10, n. (*f*), as to fines of lands in the counties palatine.

(f) The concord or agreement (by which the parties compromise or accommodate the suit) the consuser acknowledges the right of the consusee) being a most essential part of the proceeding, it will be obvious, that if any of the parties die before such concord or agreement is entered, the fine must be void; for no agreement can be entered into by a party who is dead. It has however long been the practice to acknowledge the concord even before the writ of covenant is sued out; yet the suing out of the writ of covenant (or original writ), the *licentia concordandi*, and entry of the king's silver are all still necessary, and must all precede, in point of date, the acknowledgment of the concord. When a fine is levied upon a writ made returnable as of a preceding term, or made returnable as of a return day, which is past, then the fine, generally speaking, may be considered complete, to all efficient purposes, from the time of taking the acknowledgment or concord, in order however to bar an entail or gain or confirm a title by non-claim, the proclamations must be made; and the time of computing the period of non-claim is from the last proclamation. A fine levied upon a writ returnable as of a return day which is past, has, when levied, relation to the return day; and the estate is considered as vested in the cognisee from that time. *Lloyd v. Lloyd and Sele*, 1 Bro. P. C. 379. and see *Jenk. Cent.* 250.

F. N. B. 147 a.
Co. 5. 39.

day, year, and place, and before what justices it was levied, which is therefore called the foot of the fine, because it is the last part of it, and when this is done, all is done. And of this there are indentures made by the chirographer, and delivered to the party to whom the consuance is made, which is called the engrossing of a fine, for then a fine is said to be engrossed, when the chirographer makes the indentures of the fine, and doth deliver them to the party to whom the consuance is made (g).

Engrossing of
the fine, quid.

West. Symb.
part 2. sect. 19.
Dyer, 216.
Plowd. 265.
Stat. 4 H. 7.
c. 24. 1 R. 3.
c. 7. Co. 5. 86.
Stat. 32 H. 8.
c. 36.

A fine is either without proclamations, which is also called a fine at the common law, and this is such a fine as is levied after such manner and form as fines were usually levied before 4 H. 7. upon which no proclamations were made, which fine doth still remain of the same force as it was at the common law to discontinue the estate of the cognisor if it be executed. Or it is with proclamations, which is also called a fine according to the statute, and which is such a fine as is levied with proclamations after the form and manner ordained by the statute of 4 H. 7. c. 24. (and such a fine shall every fine that is pleaded be intended to be if it be not shewed what fine it is) and of this sort were and are most fines since 4 H. 7. as being the best kind of fine of all; and it is in the election of him that sueth out the fine, as long as he liveth, to have it with, or without, proclamations (h). A fine also, whether with or without proclamations, is either executed, which is such a fine as of his own force giveth a present possession (or at the least in law) unto the cognisee, so *that he needeth no writ of *Habere facias seisinam*, or other means for the execution thereof, but he may enter; of which sort is a fine *sur cognisance de droit come ceo que il ad de*

Quotuples

(2 Co. Read.
2 Inst. 513.)

* P. 4.

(g) A fine may be engrossed at any time after it is levied. *Sir J. Brome's case*, Dyer, 254 a. 16 Leon. 96. Indeed it is not absolutely necessary that it should be engrossed at all, provided it is recorded. Co. Read. 1. Where however it is engrossed, the engrossment or chirograph is evidence of the fine (Gilb. Evid. 25. Bull. N. P. 229.); and no averment can be made against it. 2 Inst. 513 a. Dyer, 89 b. *Lloyd v. Lord Say and Sele*, 1 Bro. P. C. 379. 10 Mod. 41. And if there is any difference between the record of the fine which remains in the possession of the chirographer, named the *principale recordum*, and the record which remains with the *custos brevium*, the latter shall be amended, and made according to the former. 3 Leon. 183.

(h) By virtue of the act of the 31 Eliz. c. 2. fines, when levied with proclamations, are to be proclaimed four times; once in the term in which they are engrossed, and once in each of the three succeeding terms. The statute requires the proclamations to be made during the term, and when the judges are actually sitting; so that if any of the proclamations are made out of the term, or on a Sunday or other festival day on which the judges do not sit (being *dies non juridicus*), the proclamations will be all void. See *Fisk v. Brockett*, Plowd. 265. Dyer, 181 b. And if the proclamations are made on a day which is *dies juridici*, yet if the contrary appears from the record of the fine, the proclamations are void. When therefore a fine is intended to bar an entail, or to gain or confirm title by non-claim, it is of importance to see that the proclamations are duly made: and when a fine is given in evidence, the proclamations must be proved by a copy examined with the roll. 25. Bull. N. P. 229. If the cognisee dies before the proclamations are made, his heir may sue them to be made. See 3 Rep. 86 b. and Cro. Eliz. 692. And if the cognisor (being tenant in fee) dies before they are all made, his issue in tail will nevertheless be barred, provided they are afterwards duly made; and the entry or claim of the issue in tail before the proclamations are all made, will not prevent the operation of the fine. 3 Rep. 84, 89. It may be proper to observe, that if a fine was intended to have been levied with proclamations, and the proclamations were not made, or not duly made, it will nevertheless be a good fine at common law (Dyer, 216 a. 1 Bulst. 206.); and would be sufficient to bar dower, to pass the estate of a feme covert, &c. But see further on the operation of such a fine under the heads of Discontinuance, Entry, Non-claim, &c.

son done, which is in very deed the best and surest kind of fine of all, and is thus, *et est concordia talis, scilicet quod predict' A. recognoverit tenementa predict' cum pertinen' esse jus ipsius B. ut ill' que idem B. habet de dono predict' A. & ill' remisit, &c.* and this kind of fine doth always suppose a feoffment, or gift precedent of the same thing whereof the fine is had, which the fine is to corroborate and strengthen (i): or it is executory, which is such a fine as of his own force doth not execute the possession in the cognisee, and of this sort is a fine *sur cognizance de droit tantum*, when the party that doth levy the fine is seised of the thing, and he to whom the fine is levied hath no freehold therein, but it passeth by the fine (k): And a fine *sur done, grant, release, ou confirmation*, which is after this manner. *Et est concordia talis, sc. quod predict' A. concessit et reddidit tenementa predicta cum pertinen' prefat' B. et hered' suis durante vita ipsius A. Et predict' A. warrant' pred' cum pertinen' prefat' B. & hered' suis tota vita ipsius A.* Or thus, *Et est, &c. quod pred' A. concessit pred' B. tenementa, &c. Habend' eidem B. pro termino vite sue.* Or thus, *Et est, &c. quod pred' A. recognoverit tenementa predict' cum pertinen' esse jus ipsius B. & ille ei reddidit in eadem curia habend', &c.* Or a fine *sur Done ou Grant ou Render*, which is thus, *Et est concordia talis sc. quod predict' A. recognoverit, &c. ut ill' que idem B. habet de dono predict' A. et ill' remisit, &c. et pro hac predict' B. concessit tenementa predict' cum pertinen' prefat' A. et ill' ei reddidit in eadem Curia habendam et tenend', &c.* And if these kind of fines be not levied, or such render made unto them that be in possession at the time of the fines levied, the cognisees must enter or have writs of *Habere facias seisinam*, according to their several cases, for the obtaining of their possessions. But if at the time of levying of such an executory fine, the party unto whom the estate is limited be in possession of the lands passed, he shall not need any writ of execution to put him in possession, for then the fine will enure by way of extinguishment of right, and doth not alter the estate or possession of the cognisee, however perchance it doth better it (l). The fine *sur consueance de droit tantum* also doth serve sometimes to make a surrender, and then it is therein recited, that the conuor hath an estate for life, and the conusee the reversion: and sometimes it doth serve to

Co. 7. 32.

Vide infra.

(i) And in respect of the height of this fine, a fee-simple may pass without the word "heirs." Co. Litt. 9 b. Vin. Abr. (N. b 3.) plea 19.

(k) And vests in the conusee before entry. Co. Litt. 266 b. This fine, being *sur consueance de droit*, also conveys a fee-simple without the word "heirs." 6 Co. Rad. 7.

(l) Since the statute of uses, 27 H. 8. writs of possession are never sued out where fines are levied to uses; and the reason assigned is, that the statute executes the possession to the use. Pig. 4 Booth, 250. The reason however on which they have been discontinued does not appear a very satisfactory one: for it will be observed, that the statute of uses only operates upon a *seisin præiudicialiter* created; and if before the statute such seisin was created by the sheriff giving possession, a writ of possession would appear to be equally necessary since the statute; for the statute itself creates a seisin, but merely operates upon a pre-existing one. But though the doctrine that there is no necessity for a writ of possession where the fine is levied to uses, does not seem to rest upon a solid ground, yet it has been too long established and too long acquiesced in, to render it at all probable that it will ever be disturbed. By the act of the 4 & 5 Ann. c. 16. attornment after a fine is rendered unnecessary.

grant a reversion, and then the particular estate is recited to be in another, and that the conusor willeth that the other shall have the reversion, or that the land shall remain to the other, after the particular estate spent. A fine also is either single, which is such a fine by which an estate is granted to the cognisee, and nothing granted or rendered back again to the cognisor by the cognisee: or it is double, which is such a fine as doth contain a grant, and render back again either of the land *itself, or of some rent, common or other thing out of it to the cognisor for some estate, limiting thereby many times remainders to strangers which be not named in the writ of covenant, which also is sometimes with reservation of rent, clause of distress, and grant of the same over.

* P. 6.

Experientia.
Stat. de modo
levandi Fines.
18 E. 1. West.
Sym. ut supra.
1 H. 7. 9.
Brev. Fine,
116.

The manner and order of suing out or levying of a fine is thus. First, there is an original writ sued out, and this may be a writ of *Mesne, Warrantia cartæ, de consuetudinibus et servitiis*, or any writ of right, (for upon these or any other writ whereby land is demanded or may be recovered, a fine may be levied); but the most usual writ whereupon a fine is levied is a writ of covenant; and whilst this writ is depending, (for howsoever it be the common practice to take out a *dedimus potestatem*, and have the conusance of a fine before any original writ be sued forth, yet the original writ is always supposed in law to precede the *dedimus potestatem*, and therefore doth and must evermore bear *teste* before it^(m), or else it is erroneous) after the original writ sued forth, there is a *precipe*, which is the titling of the writ whereupon the fine is levied, and the concord and agreement of the parties, both which are fairly written, and that most commonly in parchment: after this, the party or parties that is or are to acknowledge and levy the fine, is or are to come in person before him or them that have power to take the same conusance, who are to take notice of the persons, that if there be any woman that hath a husband amongst the conusors in the fine, they do examine her whether she be willing and do it freely without compulsion of her husband. After this, all the parties that are to levy the fine are to declare themselves before the judges or commissioners, having power to take the same conusance, to be willing to pass their right in the lands according to the agreement, and to subscribe their names or marks to the concord: and if it be taken by a special *dedimus potestatem*, it is to be returned and certified under the hands and seals of the commissioners⁽ⁿ⁾ into the court of common pleas, that it may be there recorded

4. The manner
and order of le-
vying of a fine.

(m) See accordingly Cro. Eliz. 740, *Goburn v. Wright*; but it seems, if the writ of covenant and the fine both bear date in the same day, it is not error. *Arundall v. Arundall*, *ibid.* 677.
(n) By the act de modo levandi fines, the parties were obliged to appear personally in court; but as being frequently attended with great inconvenience, an ordinance of Edw. 2. addressed to the judges (generally called the statute of Carlisle), contains a proviso, that if any person, by reason of age, infirmity, or other casualty, was unable to come into court, then that two or more of the judges should go to the party and receive his acknowledgment of the fine: and that if only one of the judges went, that he should take with him an abbot, a prior, or a knight. Under this regulation (though not strictly warranted by it) has grown up the practice of issuing a writ of *dedimus potestatem*

(on

recorded and finished. And there the party conusee is first to compound with the king for his licence, for which he is to pay the king's silver, and thereof he is to have an entry on the back of his writ of covenant (o), and then he is to have it enrolled by the *custos brevium*, and upon this roll the proclamations are to be endorsed, after this, it is to be brought to the chirographer, who is first to make that note thereof that is called the note of the fine (p); and hereupon if it be a remainder, reversion, rent or seignory, whereof the fine is levied, the writ of *quid juris clamat, per quæ servitia, quem redditum reddit*, as the case requireth, must be sued forth. And after this, the chirographer is to enter the fine of record, to engross it, and to make and to

(on the suggestion of infirmity in the parties), authorizing certain commissioners therein named, to take the cognisance or acknowledgment of the fine. If the writ of *dedimus potestatem* authorizes the commissioners to take the acknowledgment of two or more persons, and they do not all make the acknowledgment, the fine will nevertheless be good against the parties who do acknowledge it. An. Cro. Eliz. 376. As the *dedimus potestatem* recites, that a writ of covenant is depending between the parties, it ought, strictly speaking, to bear date after the writ of covenant. If, however, it bears date on the same day, the fine will be good. Cro. Eliz. 677. 5 Rep. 47 b. Cro. Jac. 11. But if it bears date prior to the writ of covenant, it will be bad. *Herbert v. Binion*, 1 Roll. Abr. 791. *Goburn v. Wright*, Cro. Eliz. 740. So the *dedimus potestatem* being the authority whereby the commissioners take the acknowledgment, it ought strictly to be sued out and tested before the date of the acknowledgment. It has been held, however, that a fine was good, although the acknowledgment was taken before the teste of the *dedimus potestatem*. *Argerton v. Westover*, Cro. Eliz. 275. By the act of the 23 Eliz. c. 23. s. 5, the commissioners are directed to certify the acknowledgment of the fine within twelve months after it is taken, and also to certify the day and year on which it was taken; and if any of the commissioners die before they have certified, their personal representatives must certify upon a writ of *certiorari*. If the writ of *dedimus potestatem* is directed to two or more jointly, and only one of them takes the acknowledgment, the fine will be bad. But a fine will not be bad on account of a trifling error in the return made by the commissioners, as by certifying that the execution of the writ appeared in a certain panel annexed to the writ, instead (as it ought to have been), in a certain schedule. *Bedford v. Forster*, Cro. Jac. 77. The commissioners named in the writ of *dedimus potestatem* should be very careful to satisfy themselves that the parties acknowledging the fine are really the proper parties, and that they are of sane mind, full age, &c.; for by a rule of court, of Hilary term 17 Geo. 2. (see *Wilson on Fines*, 102.), one of the commissioners is required to make affidavit that he "knew the parties acknowledging such fine; that the same was duly signed and acknowledged; that the party or parties acknowledging, and also the commissioners taking the same, were of full age and competent understanding; that the feme covert (if any) were solely and separately examined apart from their husbands, and freely and voluntarily consented to acknowledge the same; and that the cognisor or cognisors, and every of them, knew the same to be a fine to pass his, her, or their estate or estates." The same rule of court requires, that the person making the affidavit (except where the persons acknowledging the fine are in Ireland, or beyond the seas), shall be an attorney of some of the courts of Westminster Hall. By another rule of court, of Hilary term 26 & 27 Geo. 2. "the person or persons so making the affidavit are to swear that the fine was duly signed and acknowledged upon the day and year mentioned in the caption; and if there be any razure or interlineation in the body or caption of such fine, that such razure or interlineation was made before the party or parties signed the said fine, and before the caption was signed by the commissioners."

Rules of court emanating from the court, it may, whenever it sees fit, dispense with the observance of them. It has dispensed with the above rules, so far as to receive an affidavit of the acknowledgment of a fine, where such affidavit was made by a commissioner who was not an attorney. In a case where the commissioner who was an attorney died without making the requisite affidavit. *Say v. Smith*, Barnes, 217. So, an affidavit stating the commissioner named in a *dedimus potestatem* to be an attorney of the court of king's bench, was suffered to pass, although it did not contain the words, "at Westminster." 5 Taunt. 263. And in a case where the acknowledgment was taken at Edinburgh, the fine was suffered to pass without an affidavit by an attorney of the courts at Westminster. *Seton v. Sinclair*, 2 Black. Rep. 880. Where, indeed, the acknowledgment of a fine is taken abroad, the case is not within the above noticed rules of court. *Fleetwood v. Calenda*, Barnes, 218. *Heathcock v. Hanbury*, Barnes, 217.

(o) When a year and a day have elapsed from the acknowledgment of a fine, an affidavit must be made, that all those who depart with any interest by the fine are still living, otherwise the king's silver will not be received. Barnes, 215.

(p) Which must be enrolled in the proper office, according to the statute of the 5 H. 4. c. 24.

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deliver the indentures thereof unto the conusee (g); and if it be a fine with proclamations, it is *to be proclaimed openly in the court of common pleas once every one of the four terms next after the engrossing of it, (and it was to be proclaimed within the county where the land did lie at every assises and sessions the next year after the engrossing of it, but this it seems is not necessary now) and the next term after the engrossing of it the contents thereof are to be recorded in a table, made for that purpose, to be set up in the court of common pleas at Westminster in an open place all the term time; and so also at every assises, the fine may also be enrolled and exemplified.

* P. 6.

Statute of
Fines. 18 E. 1.
Co. 1. 5. Plow.
358. 265.

A fine is a record as of great antiquity, so of a high nature, great force, and much credit and esteem; and it is now become and serves for a formal conveyance of land, one of the common assurances of the kingdom, for by this means a man may convey his land to another in fee-simple, fee-tail, for life, or years, with reservation of rent also. It is therefore called a feoffment of record (r), for it doth countervail a feoffment with livery of seisin in the country, and it includeth all that the feoffment doth; and worketh further of his own nature, and it is indeed for many purposes the best and most excellent assurance of all others, for by the ancient common law it was so high a bar, and of so great force, and of so strong a nature in itself, that it did conclude and bar not only such as were parties and privies thereto and their heirs, but all others of full age, out of prison, of good memory, and within the four seas, the day of the fine levied, if they did not make their claim within a year and a day. And it is still of that force, albeit it be somewhat enfeebled by some statutes, that either it passeth all the right and interest of the conusor to the conusee, or else it worketh by way of extinguishment and estoppel (s), and doth perpetually bar the conusor and his heirs of all present and future right and possibility of right or other collateral benefit to the thing whereof the fine is levied. And if it be a fine with proclamations, it doth in time become a perpetual bar to all others also, that have right, except they do take care to prevent the bar by their claim, action, or entry, within five years after the proclamations ended. And it barreth entails peremptorily whether the heir do claim within five years or not, if he make his claim by him that levied the fine.

5. The nature,
use, and fruit
of a fine.

West. Symb.
in his Tract of
Fines. 17 E. 3.
5. 17 Ass. pl.
17. Litt. sect.
731. Perk.

Any person male or female, body sole, or corporate, that hath capacity to grant, or is able to be a grantor by a deed, may levy a fine and be a conusor therein, but there are certain persons prohibited by law, which the judges or commissioners that take the conusance of fines ought not to

6. What shall
he said a good
fine, or not;
and how.
1. In respect of
the persons

(g) Though it is usual to complete the indentures of the fine immediately on its being levied, yet there may be many years between the levying and the engrossing of a fine. Plowd. 366.

(r) See *supra*, page 2, note (b), as to the accuracy of calling a fine a feoffment upon record.

(s) Where it is wished to bind a mere possibility in lands (as the hope of succession which an heir apparent has to his ancestor), a fine levied of the lands will operate by estoppel, provided the lands afterwards actually descend upon the party levying it. But this is to be understood of the case, where the ancestor is seised in fee: where he is only seised in tail, the fine, it is conceived, though levied with proclamations, has no operation. See *infra*, page 26, note (i).

admit

thereunto and their capacity; and by, or to whom a fine may be levied, and who may be consors or connuses; and by what names.

* P. 7.

Non sana memoria.
Persons attainted.

Infants.

admit or receive, and yet if they do admit them, and a fine be levied by such persons, the fine is good and unavoidable, *feri non debet, sed factum valet*: and of this sort are madmen, lunatics (†), villains, idiots, men that have the lethargy, doting old persons that want discretion, drunken men, and men that are forced to *it by threatening, imprisonment, or the like, also such as are born blind, deaf, and dumb, but a man that becomes so accidentally may be received, and ought not to be refused. Also persons attainted of felony or treason ought not to be received to levy a fine, but such persons being admitted to levy a fine, the fine will be good against all persons but the king and the lord of whom their lands whereof the fine is levied, are held for their times: but persons waived or outlawed in personal actions only ought not to be refused. ^aAlso infants ought not to be received to levy a fine, and yet if an infant be admitted to levy a fine, and he do not avoid by writ of error during his minority (as he may if it be not a fine *sur grant et render* in tail, or for life,) the fine will be good for ever against him and all others. ^bAnd if he die during his nonage, before he hath avoided it, it seems his heir can never avoid it, and yet upon this point the judges of the common pleas have been divided on a solemn argu-

sect. 24. Fitz. Fines 120. See in Grant, *infra*, chap. 12. Numb. 4.

* 17 E. 3. 52. Crompt. Jur. 37. 10 E. 4. 13.

^bPerk. sect. 19. Dyer, 220. & per Just. Bridgman's opinion in private.

(†) All persons of unsound mind, are, generally speaking, incapable of levying fines, and the statute *de modo levandi fines*, expressly directs, that such persons shall not be permitted to acknowledge a fine. If, however, an idiot, or other person of unsound mind, should be permitted to levy a fine, such fine, it would seem, and also the declaration of uses, is good at law, and cannot be avoided. *Bushley's case*, 12 Rep. 124. *Lewing's case*, 10 Rep. 42. Winch. 106. *Mansfield's case*, 12 Rep. 123.; and see 10 Rep. 42. 2 Rep. 58. In the case, however, of *Lister v. Lister* (Barnes, 218.) the court made a rule to shew cause, why a fine levied by a person asserted to be insane, should not be vacated, and the party was brought into court and examined by the chief justice, but appearing to be a person of a good capacity, the rule was discharged, and the fine held good. But though the rule was discharged because the party was found to be of sufficient capacity, yet it is to be inferred, that the court would have vacated the fine had the party been found wanting in capacity, and to have done so would have been agreeable, it is apprehended, to the justice and good sense of the thing. As to "the high nature of fines," "their solemnity," of "not allowing an averment to be made against any fact which is once upon record," these appear but weak reasons for holding that an idiot or madman may dispose of his property, provided he dispose of it by fine. And as to any danger to be apprehended to the security of possessions from reversing fines levied by persons of unsound mind, no such danger, it is presumed, could possibly exist, but rather the contrary; as attempts at fraud would be thereby discouraged, and weak men more effectually shielded from the arts of the designing. And if it should be contended, that the reversing of fines levied by incompetent persons, would affect the validity of such as were levied by persons who were not incompetent; and that the security of possessions would in that way be endangered, no fear, it is presumed, could be worse founded; for, as it would rest with the judges to decide as to the competency or incompetency of the parties, they would take care, whilst they set aside fines levied by incompetent persons, to support such as were levied by persons who were not incompetent.

^a The case, therefore, of *Lister v. Lister*, seems to have sound sense for its support, and is entitled to more respect than the cases opposed to it. Indeed, the cases opposed to it appear to be also opposed to an express act of parliament; for to hold that a fine by an idiot is good, what is it but to hold that an idiot may acknowledge a fine, though the act above noticed expressly says he shall not? Where a person of unsound mind is permitted, from mistake or otherwise, to levy a fine, the statute *de modo levandi fines* would not only warrant, but it is conceived, by necessary construction, requires the court in which it is levied to vacate such fine. Supposing, however, that a fine by a person of unsound mind cannot be vacated at law, yet if there was any fraud in obtaining it (and it is hardly possible there should not), the court of chancery considers the parties who take any interest under it, and with notice of the fraud, as trustees for the parties defrauded, and will decree a re-conveyance of the land. *Cartwright v. Pulteney*, 2 Atk. 381 and 387. *Addison v. Dawson*, 2 Vern. 678. *Wilby v. Wilby*, Tothill. 99. And the plea of non-claim is of no avail in cases of fraud. The interposition, therefore, of equity renders the doctrine which prevails at law of the less importance (though it would certainly be desirable that there was a remedy at law in such cases); and the rule of court, which requires an affidavit from one of the commissioners taking the fine, that the consors were of competent understanding, affords considerable protection against the abuse of obtaining fines from persons of incompetent understanding.

ment,

17 E. 3. 52.
30 E. 3. 5.
27 Ass. pl. 53.
Perk. sect.
19, 20.
Co. 7, 8.

ment, and of this *Just. Dod.* is 17 Jac. made a quere (u).
* Also women that have husbands ought not to be admitted
alone without their husbands to levy fines, and yet if such a
woman alone levy a fine of her own land she hath in fee-
simple, and her husband do not avoid it (as he may if he
will) by writ of error, entry or otherwise during her life,
or after her death during his own life, if he be tenant by
the curtesy, this is now a good fine, and will bind her and
her heirs for ever, except she be an infant at the time of
the fine levied, and her husband happen to die during her
minority, for then in that case, if it be not a fine *sur grant*
et render to her in tail or for life, she may avoid it during
her minority, but if the coverture continue until her full
age, in that case she cannot avoid it except her husband
join with her in it; but the husband and wife ought to be
received together to levy any fine of her land (w). If such
persons

Women co-
vert.

(u) The law makes a distinction, with respect to an infant, between *matters of record* and *matters in pais*; the latter he may avoid either before or after he comes of full age, but the former only during his minority; because *matters of record*, as fines, are judicial acts, and taken by a court, or a judge; and therefore the non-age of the party to avoid the same shall be tried *by inspection of the person of the infant by the judge*, which cannot be done after his full age; but if a writ of error is brought by the infant to reverse a fine for non-age, and it is recorded that he is within age, and he afterwards dies before the fine is reversed, his heir may reverse it; or if he comes of full age before the reversal is complete, it may be reversed after his full age. Co. Litt. 131 a. 380 b. Cro. Jac. 230. 2 Inst. 483. Moore, 844. 12 Mod. 444.

If, however, after his non-age is recorded, and before the fine is reversed, he should come of age and levy another fine, the second fine will prevent his reversing the first. See *Hart's case*, 10 Vin. Abr. 16. In reversing a fine by an infant, the court may examine him upon an oath of *voir dire*, or inform themselves by the evidence of his parents, by registers of baptisms, or any other kind of evidence. Roll. Abr. 573. All persons making any complaint against fines acknowledged by infants, femes covert without the consent of their husbands, or persons of nonsane memory, or otherwise disabled by law to acknowledge the same, or by any person in the name of another, or by the like deceit, and obtaining rules for the staying of such fines, must attend to the directions contained in the rules of court made in Hilary term 28 & 29 Car. 2., and Easter term 29 Car. 2.

Till a fine levied by an infant is reversed, the declaration of the uses will be good. 2 Rep. 58 a. 10 Rep. 42. 12 Rep. 124. 1 Ves. 304. Hob. 224. It will be proper to notice that by virtue of the statute of the 7 Ann. c. 19. infant trustees and mortgagees may, under the direction of the court of chancery or exchequer, convey the trust or mortgage estate; and where the infant trustee or mortgagee could not convey, if of age, without a fine, the court will order him to levy a fine. *Ex parte Mevey*, 5 Atk. 479. 3 P. Wms. 387. *Lombe v. Lombe*, Barnes, 217. See the act of the 4 Geo. 3. c. 16. enabling infants, trustees of lands within the counties palatine of Chester, Lancaster, and Durham, and in the principality of Wales, and within the duchy of Lancaster, to convey under the direction of their respective courts.

(w) It is too well known to require noting, that a fine levied by a feme covert, either of her own inheritance, or to bar her jointure or dower in her husband's estate, is binding upon her where her husband joins in levying it. And if she levies a fine without her husband, and it does not appear on the record of the fine that she was under coverture (1 Sid. 122.), the fine will be a bar to her and her heirs. 1 Inst. 46. (a). Hob. 225. 7 Rep. 8. (a). 10 Rep. 43. (a). The husband however may enter and defeat such fine, either during the coverture, in order to restore himself to the interest which he had in her lands *jure uxoris*; or after her decease, in order to obtain his estate by the curtesy; and if the husband avoids the fine during the coverture, neither the wife or her heirs will be bound by it. 1 Inst. 46. (a). n. 7. And the fine will be avoided as to the whole of the lands, by the husband entering into a part of them. *Mayo v. Coombes*, 1 Freeman. Rep. 396. Pollexf. 164.

In the case of *Johnson v. Ogilby*, 3 P. Wms. 277, it appears that a bill of indictment was preferred against a married woman for a fraud, in levying a fine as a feme sole.

Though a married woman will not, generally speaking, be permitted to levy a fine without her husband's concurrence, if it is known that she is under coverture, yet in certain cases the court has suffered it: as in a case where the husband, after selling the estate and executing the conveyance, had become insane; the court observing that there appeared to be no objection to the acknowledgment being taken, adding *valent quantum*. *Stead v. Irard*, 1 Bos. & Pul. New Rep. 312. So where the husband sold lands and covenanted that he and his wife, when of age, would levy a fine, and the husband afterwards going abroad, the wife's acknowledgment, *de bene esse*, was taken by the chief justice. *Morcan's case*, 2 Bl. Rep. 1205. But see *Abney's case*, 1 Taunt. Rep. 37. On account however of its appearing on the record of the fine, that the wife was under coverture, such a fine could

Corporations. persons as are civilly dead, as friars, monks, and the like, be admitted to levy a fine, the fine is void. But such civil bodies as have absolute estate in their possessions, as mayor and commonalty, dean and chapter, colleges, and other societies corporate, may levy fines of the lands they hold in common, even by the common law, and such fines are good; but ecclesiastical persons, as bishops, deans, masters of hospitals, parsons, vicars, prebends, and such like, are by divers statutes restrained to levy fines of their spiritual inheritances (x).

West. Symb.
part 2. sect. 9.
Plow. 538. 575.
Co. 11. 78. 1.
in Magdalen-
College case.

Any person that hath capacity to take by grant, or may be a grantee by deed, may take by fine and be a conusee therein, as any person male or female, of full age or under age, whether it be a *feme covert* (y), mad person, lunatic, idiot, any person in prison, or beyond the sea, also any person attainted of felony or treason, or outlawed in any personal action, a bastard, clerk convict, or alien, may be conusee in a fine, and a fine levied to such persons is good. "Also corporations spiritual and temporal may be conusees in fines, and fines levied to them are good; but before the engrossing of such fines there goeth always a writ to the justices of the common pleas, *quod permittant finem illum levare*. But such persons as are civilly dead, as friars, monks, and the like, cannot be conusees in a fine, and therefore a fine levied to such persons is void.

3 H. 6. 42.
41 E. 3. 7.
50 E. 3. 9.
24 E. 3. 62.

* P. 8.

5 H. 7. 25.
19 H. 6. 25.
Dyer 188.

The names of cognisors and cognisees in fines must be certainly set down, and they must for the most part be described by their right names of baptism and surname, whether they be king, princes, dukes, marquisses, earls, viscounts, barons, lords, or knights, which be names of dignity, but some of these are sometimes described without their surname, as *Georg' Comes Salop. Johannes Dux Lancast.* or whether they be esquires or gentlemen, which be names of worship and honour. But these additions of names of dignity and honour given to such persons or any others, as bishops and the like, are used in fines rather of

West. Symb.
in his Tract of
Fines.

could be of little avail, for there being error apparent on the record, it may be avoided even by the wife herself or her heirs. If however it was levied as by a *feme sole*, it would probably be good, for the wife herself could not defeat it, and if the conveyance by the husband contained a covenant that he and his wife would levy a fine, his covenant, it is presumed, would estop him from defeating it. See 1 H. Bl. 341.

In the case of a fine by a married woman, without her husband's concurrence, her declaration of the uses will be good so long as the fine itself remains in force. *Mangfield's case*, 12 Rep. 183. 2 Rep. 58. 10 Rep. 42. (b).

A fine by a husband and wife will remain good, though they should be afterwards divorced. See Rol. Abr. 20.

(x) The queen may levy fines: an alien who has purchased land cannot levy a fine if the court perceives it; but if the fine is levied, it is good, except as against the king, and shall never be reversed. Co. Read. 17. Densh. R. on Fines, 13. Persons outlawed, or waived in personal actions, may levy fines. West. Symb. p. 2. s. 13. If a tenant in tail, guilty of felony, levies a fine with proclamations before conviction, such fine will bar the issue, and enure to the benefit of the lord. Ca. Litt. 2 b. n. 10. 1 Wils. Rep. 220. Persons deaf, dumb, and blind, are not competent to levy fines, unless they can express their meaning by writing or signs. *Elliot's case*, Cart. 53.

If any person levies a fine in the name of any other person, who is not privy nor consenting thereto, and shall be lawfully convicted thereof, such person so levying the fine, shall, by 21 Jac. 1. c. 26. suffer death without benefit of clergy.

(y) If a fine is levied to a married woman without her husband, the husband may avoid it during the coverture, or she herself may avoid it after her husband's death, and if she does not agree to it after she becomes sole her heir may avoid it.

curtesy

curtesy than of necessity, for they are not needful in fines. But in case where there be two of one name it is safe to make some addition by way of distinction, as *senior* and *junior* and the like.

7 H. 4. 22.

If a woman, living her first husband, take a second husband, and with him and by his name acknowledge a fine, it seems this is void because of this mistake; but if a woman with her right husband, by a wrong christian name, levy a fine she is concluded by it, and cannot avoid it during her life. * And yet if a fine be levied to a man and his wife by a wrong name, as to *A.* and *Sibill* his wife, when her name is *Isabell*, this is holden to be void. † But if a fine be levied by a woman by the name of *Margery*, when her name is *Margaret*, or by the name of *Agnes*, when her name is *Anne*, it seems this fine is a good fine.

* 1 Ass. pl. 11.

† F. N. B. 97 a.
Litt. Broo.
sect. 344.

Writ. Symb.
ubi supra.

The persons or judges before whom a fine is to be levied are of two sorts, for some are judges only at the time of the cognisance, and certificate thereof, and others are judges to whom the cognisance is to be certified, and before whom it is to be recorded. The first sort are such as have power to take such cognisance, either *ex officio*, and by virtue of their offices; or by some commission general or special granted unto them by the king out of chancery; † as all or any two of the justices of the common pleas may in open court take knowledge of fines and record them by virtue of their office. † Or the chief justice of that court may by the prerogative of his place take cognisance of fines in any place out of the court, and certify the same without any writ of *dedimus potestatem* (2): † and so also as it seems may two of the justices of that court with the consent of the rest: or one of them with a knight (but this is not usual at this day.) † Also justices of assise, by the general words of their patents, may take and certify cognisances of fines without any special *dedimus potestatem*, but at this day they do not use to certify them without a *special writ of *dedimus potestatem*. And fines have been levied before justices errants.

* Stat. 15 E. 2.
Stat. de Carbi.

† Dyer 244.
Crompt. Jur.

† Stat. 15 E. 2.
Broo. Fines 20.

† Dyer 224.
Broo. Fines
120.

Crompt. Jur.
92. F. N. B.
147. a b. 146.
F. G.

† Curia. 39 &
40 El. 17.
† Dyer 230.
* H. 6. 21.

Also cognisances of fines are taken by a special writ issuing out of the chancery called a *dedimus potestatem*, whereby commission is given in divers cases to a private man for the speeding of some act appertaining to a judge upon a surmise that the parties that are to do the same are not able to travel, and by this writ upon such a surmise, power may be given to any serjeant at law alone, or to any knight and gentleman together, to take the cognisance of such persons, and they may by virtue thereof take the same † either of all or some of the parties; † and that, as it seems, in any place accordingly. † But a justice, or other person being cognisee in a fine, may not take the cognisance thereof himself. And all those that have power to take the cognisances of fines are to take great heed of whom they do take the same, and whom they do

2. In respect of the persons before whom it is acknowledged, and the persons and place before whom and where it is recorded. And what persons may take cognisance of fines or record them, and where, and how, and the duty of such persons therein.

* P. 9.

Dedimus potestatem, quid,

(2) But the chief justice of England cannot, nor any other of the chief justices except the chief justice of the common pleas, who hath this authority by custom and not by any statute. 9 Co. Read. admit

admit to make such conusances before them. * And therefore they are to see that they know the parties that are to be cognisors, that they suffer not one man to make a conusance in another man's name (a), and that they do not take any conusance from any person prohibited by law (b), for misdemeanors by such persons herein are punishable in the star-chamber (c). * And if there be any woman that hath a husband that doth join with her husband in the conusance, the judges or commissioners must take care they do examine her whether she be willing, and do part with her right in the land willingly, or by compulsion of her husband, for albeit she be made to do it by compulsion of her husband, yet hath she no way to relieve herself when it is done. * And after the commissioners have taken the same cognisances by *dedimus potestatem*, they are to certify the same truly, and the day and year when it was taken, * and not another time (for this may be a misdemeanor punishable in the star-chamber) and to return the commission into the court of common pleas under their hands and seals within a year after the taking of the same conusance, at the farthest. * And if they refuse to return or certify it, the party grieved may by a writ called *cognitionibus admittendis* or a *certiorari* compel that commissioner that hath it in his custody, or his executor or administrator if he be dead, to certify it (d). * But if any of the cognisors happen to die before it be certified, then it cannot be certified at all, for it cannot now be made a good fine. * And so also (as some hold) if the king die. * But if the king's silver be entered in paper or upon the back of the writ of covenant, as the use is, and the party die after this, in this case the fine may go on, and will be a good fine notwithstanding the death of the party.

And judges for the recording of fines be the justices of the common pleas only, and therefore all cognisances of fines must be certified thither, for in that court only (e), and not in any other of the courts * of record at Westminster, or in other inferior courts, or ancient demesne (f),
are

* 34 H. 6. 19.
Broo. Fines 11.
Crompt. Jur.
32. 92.

* 42 E. 3. 7.
3 H. 6. 42.
Perk. sect.
613. Doct. and
St. 155. Crompt.
Jur. 55.

* Stat. 23 Ed.
chap. 3. Dyer
320.

* Dyer 220.
Crompt. Jur.
92.

* Regist. or, 68
F. N. B. 147 b.

* Dyer 246.

* 1 H. 7. 9.
Broo. Fines,
124.

* Dyer 220.
Stat. 15. E. 2.
44. 44 E. 3. 34.

*Cognitionibus
admittendis,
quid.*

* P. 10.

(a) The statute 21 Jac. 1. c. 26. makes it felony for one person to levy a fine in the name of another without his privity or consent.

(b) An infant (except an infant trustee or mortgagee) being disabled by law from levying a fine, the court of C. B. ordered an information to be prosecuted against the commissioners who took the conusance of a fine from an infant feme tenant in tail with her husband, and the fine to be vacated, *quoad* the feme only. *Hutchinson's case*, 3 Lev. 36. see also *Serjeant Buckley's case* to the same effect in Skinner's Rep. 23.

(c) The jurisdiction of the court of star-chamber abolished by the act of the 16 Car. 1. cap. 10.

(d) For the rules made by the court of C. B. touching the certificate of the commissioners, and of the oath to be made of the acknowledgment of the fine, see Wils. 81 to 90. and see *supra* page 5, note (a).

(e) If a suit is depending in the court of king's bench at Westminster, on a writ of error, a fine levied in that court would be good. See Densh. Read. 3. and 13 Vin. Abr. 217. And it is said that a fine levied on an original writ, returnable in the king's bench, is not void, but only voidable. See 13 Vin. Abr. 217. Co. Read. 9. A fine levied in a court which has no jurisdiction is *coram non judice*, and absolutely void.

(f) But see the case of *Hunt v. Brown*, 1 Salk. 340. Com. Rep. 93. 124. (and see Dy. 111 b.) where the court resolved, that a fine may be levied of ancient demesne lands, in the court of ancient demesne, although it is no court of record. But such a fine, when levied of an estate tail, has only the operation of a fine at common law, and will not bar the issue from bringing a formedon; for a fine to bar an estate tail must be levied with proclamations pursuant to statute; and there is no statute which authorizes proclamations on fines in a court of ancient demesne. To bar, therefore, an estate tail

1 50 Ass. pl. 9. are fines to be levied. * But by special grant a fine may
 2 Stat. 2 E. 6. be levied in a base court. 3 And by certain acts of par-
 c. 28. 37 H. 8. liament fines may be and are levied in the county palatine
 c. 19. 5 Eliz. of Chester, county palatine of Lancaster, and county pa-
 c. 27. latine of Durham, of lands lying within those places.
 And if any persons do take conuſance of fines other than
 ſuch as before that have power, or any other persons or
 judges ſhall record fines, or they ſhall be levied in any
 other court or place than as before, ſuch fines are void.

Stat. 32 H. 8.
 c. 7. West.
 Symb. in his
 Tract of Fines,
 ſect. 23. 50.
 ſee in expoſi-
 tion of Deeds,
 infra.

A fine may be levied of all things whereof a *Præcipe quod reddat* lieth, and of all things which are inheritable and in *eſſe* at the time of the fine levied, whether the thing be eccleſiaſtical and made temporal, or temporal (*g*). As of an honor, manor, iſland, barony, caſtle, meſſuage, cotta-ge, mill, toft, curtilage, dove-houſe, garden, orchard, land, meadow, paſture, wood, underwood, chapel, river, chantry, corrody, office, fiſhing, warren, fair, rectorſy, mines, a view of frank-pledge, waife, eſtray, felon's goods, deodands, hoſpital, furzes, heath, moor, rent, common, advowſon, hundred, way, ferry, franchise, ſeignory, reverſion, toll, tallage, pickage, pontage, aquital, ſervices, por-tion of tithes, oblations, or the like (*A*). And therefore
 fines

3. In reſpect
 of the thing
 whereof the
 fine is levied,
 and of what
 things a fine
 may be levied
 or not, and by
 what names.

tail in lands held in ancient demesne a recovery is neceſſary, for (as we have juſt ſeen) a fine in the court of ancient demesne will not be a bar, and a fine in the common pleas may be reversed by the lord. But ſee p. 23, n. (2).

The iſle of Ely being a royal franchise, and the biſhop having *jura regalia*, fines may be levied in the biſhop's court of lands within the franchise. So fines may be levied by *cuſtoms* (but not without. 8. P. 1 Leon. 188.) in the courts of cities and corporate towns, where ſuch courts have authority to hold pleas of land. See Co. Read. 9. 1 Leon. 188. But a fine levied in theſe courts will not bar an eſtate tail. Fines, however, in the courts of the counties palatine of Lancaſter, Durham, and Cheſter, in the portmoothe court of the city of Cheſter, and in the courts of the great ſeſſions in Wales, will, when duly proclaimed, bar eſtates tail; as the ſtatutes authorizing fines to be levied in theſe courts* declare, that when levied with proclamations they ſhall be of the ſame force with fines with proclamations levied in the common pleas at Weſtminſter.

If a fine is found, by verdict, to have been levied before the juſtices of the county palatine of Lancaſter (and it would be the ſame, it is preſumed, in the caſe of a fine levied in the courts of great ſeſſions in Wales, in the courts of the counties palatine of Cheſter, Durham, &c.) without finding who the juſtices were, or whether they had authority to take the acknowledgment of the fine or not, it will be preſumed that they had ſuch authority, unleſs the contrary appears. 1 Wils. 275. It may be proper to obſerve, that in Wales, and the counties palatine, fines acknowledged in vacation are levied as of the *next great ſeſſions*, &c. at which time the writ of covenant is made returnable. Where a fine therefore is neceſſary, in order to give a purchaſer a good title, the purchaſe cannot be ſafely completed, nor the purchaſer pay his money during the vacation. Indeed wherever a fine is neceſſary to the validity of a purchaſer's title, he ought not to pay his money until the fine is levied.

(*g*) Or whereof a *præcipe quod faciat* lies, as the writ of cuſtoms and ſervices; or a *præcipe quod permittas*, as to have a common way, &c.; or a *præcipe quod teneat*, as the writ of covenant to levy a fine, and the like. 2 Inſt. 513.

(*A*) To the enumeration of the things of which fines may be levied, may be added *shares in the new river water*, whereof fines are levied by the deſcription of ſo much land covered with water; and when a fine or recovery of theſe ſhares are neceſſary, as the new river runs through the ſeveral counties of Hertford, Middleſex, and London, there muſt be three ſeveral fines or recoveries. 2 P. Wms. 138.

Where money is agreed or directed to be laid out in lands, the money, in equity, is conſidered as land or real eſtate. It frequently happens that the perſon who would have been entitled to the lands in fee or in tail, in caſe they had been purchaſed, is deſirous of taking the money as money, and not to lay it out. Where the party would have been entitled to the lands *in fee*, provided they had been purchaſed, courts of equity, upon a bill filed for the purpoſe, have always ſuffered him to take the money. But, according to ſome old caſes, where he would have been entitled to the lands only as *tenant in tail*, then the courts would not allow him to take the fund as money, but required it to be actually

* In the city of Cheſter by the 43 Eliz. c. 15; in the county palatine of Cheſter by the 2 & 3 Ed. 6. c. 28; of Lancaſter by the 37 Hen. 8. c. 19; of Durham by 5 Eliz. c. 27; and in the courts of the great ſeſſions of Wales by the 34 & 35 Hen. 8. c. 26. s. 40.

finis de honore de S. or de manerio de S. or de castro, et de castello de S. cum pertinen' are good. So *finis de uno menagio, uno cotagio, uno molendino*, without *aquatico* or *granatico* annexed, are good. So *finis de uno tosto, uno curtilag. uno columbario, uno gardino, uno pomario, decem acris terræ, decem acris prati, decem acris pasture, decem acris bosci, decem acris subbosci, de balliva sive officio bailivat' de D. de custod. sive officio custod. de B. de custod. parci & forrestæ de D. officio senescaliæ de S. cum pertinen', decem acris brueræ, decem acris moræ, decem acris uncuriæ, decem acris marisci, decem acris alneti, decem acris rucariæ*, are good. Also *finis* may be *de vis. fran' pleg. libertate & franchesiis, in D. wardis maritagiis, eschaet catall. felonum, wariat extrahur. de cattall. fugitivorum, utlagat. attinet. de ferreis. mercat. wrecco maris, or, de rectoria ecclesiæ parochialis de M. or, de decimis granorum, garbarum & feni eidem rectoriæ spectan' &c. or, cum omnibus decimis granorum, garbarum & feni eidem rectoriæ spectan', or, de decimis garbarum, ad ecclesiam de M. qualitercunque spectan', or, de*

invested. He had therefore no way of getting at it as money, except by laying it out in a fictitious purchase, and by levying a fine, or suffering a recovery of such fictitious purchase. But this practice has, for some time, been departed from, and courts of equity, upon a bill filed, have decreed the money to the tenant in tail, wherever, by *levying a fine*, he could have rendered himself absolute owner of the lands, in case they had been purchased. But where a recovery would have been necessary to have rendered him absolute owner, *there* the court always directed the money to be laid out, in order that those in remainder might have a chance.

The act however of the 39 & 40 Geo. 3. c. 56. has greatly altered the doctrine and practice relative to the taking of money to be laid out in the purchase of lands as money. It may now be obtained, by *petition* to the court of chancery, by the person who would have been entitled to the lands for the *first estate tail*, in case they had been purchased, provided such person is of age; but if there is any one who is entitled to any antecedent particular interest, such person must join in the application to the court.

This act having rendered fictitious purchases and the levying of fines and suffering recoveries of such purchases altogether unnecessary, it may not be improper briefly to notice the decisions which have been made upon it.

If an order under the act is made out of term time, for the payment of money to a person who is tenant in tail with remainders over, the order cannot be acted upon unless the party is living on the second day of the ensuing term. *Louton v. Louton*, note, 5 Ves. 12. *Ex parte Bennett*, 6 Ves. 116. And if the order is even made in term time, it cannot be acted upon till the ensuing term, unless there is sufficient time in the same term, in which a recovery might have been suffered, supposing the money had been actually invested in lands. *Ex parte Frith*, 8 Ves. 609.

The court indeed will make no order for the payment of the money until an enquiry is made, whether there is any incumbrance affecting the fund. *Ex parte Bennett*, 6 Ves. 609. *Ex parte Hodges*, 1b. 376. *Clayton v. Graham*, 10 Ves. 288. And for this purpose the court requires to see the settlement or will which directed the fund to be invested (*Ex parte Frith*, supra.); and likewise requires an affidavit from the parties entitled, that they have not settled or incumbered it. *Binford v. Bardon*, 2 Ves. jan. 38. If the party entitled is a feme covert, she must be separately examined; but the examination may be by commission. *Tusburgh's case*, 1 Ves. & B. 507.

It may be proper to observe, that it is only where it is clear that the party applying for the money would be entitled to the lands in tail, in case they were purchased, that the court will direct the money to be paid; for if it is doubtful whether he would be entitled to them in tail or for life, the court will not, on an *ex parte* application, decide the point; and therefore will make no order for the payment of the money.

If a trustee of money to be laid out in lands should pay it to a tenant in tail without the authority of the court, it would be a payment by wrong; and the issue in tail or remainder-man might probably compel him to pay it over again. See *Cunningham v. Moody*, 1 Ves. 174. It is not, however, by any means clear that the court would compel him to do so; for it is held, that courts of equity will always support the act of a trustee, where he does nothing more than the court would have obliged him to do. See *Moody v. Walters*, 16 Ves. 283. and see 7 Ves. 150. and *Bowater v. Elley*, 2 Vern. 34. and *Franklin v. Green*, 1b. 137. But see *Andrew v. Partington*, 3 Bro. C. C. 60. which militates against this doctrine. If indeed a trustee should pay the money to a tenant in tail, with remainders over, out of term time, and he should die before a recovery could have been suffered in the ensuing term, in that case there can be no doubt but the remainder-man might compel the trustee to pay again.

omnibus

omnibus & omnimod' oblationibus, decimis granorum, garbarum, feni, lanae, lini, canibis, porcellorum, aucarum, agell. or, &c. & aliis emolumentis quibuscunq; spectan' crescent' sive existen' cum pertinen' in D. also fines may be de cilio salium plumbarum, aquae salcae, puteo, or, de theolento, stalagio, picagio, pontagio, infra burgum de D. or, de quodam corrodio unius panis, unius lagenae cervisia pro omnibus hominibus in D. or, de chiminio, de piscaria, or de libera warrenna, or de frankfold, de franchesia, or, de nundinis de D. singulis annis ad festq de M. ibidem tenend' *mercat' de D. quiet. sive libero passagio ultra aquam de D. or, de communia, or de pastura pro omnibus animalibus, or pro omnibus averiis, or de pastura pro decem ovibus, or pro decem bovis, equis, vaccis, porcis, spadonibus, &c. or de communia pasturae quod praedict' M. B. habet & habere solebat pro omnibus averiis suis in centum acris terrae ipsius I. A. in D. or de advocacione ecclesiae de D. or de advocacione tertiae partis ecclesiae, &c. or de rectoria de D. advocat. praesentat. donat. libera dispositione, & jure patronatus ecclesiae de D. or de patronagio cum advocacione vicaria ecclesiae de D. & capell. eidem rectoriae annex', or de tertia parte advocacionis, ecclesiae, &c. or de medietat' advocat' ecclesiae, or de advocacione medietatis ecclesiae, or de medietate, or de tertia parte messuagii, decem acris terrae, or the like, and these fines are good. Also a fine may be de homagio, or de feod' militis, or de uno feod' milit' in D. or de servitio unius paris calcarum deauratorum, or de servitio inveniendi hominem equitem, or peditem ad eundem vel ad equitandum with the cognisee in exercitu Walliae, &c. or de minera plumbi & cujuscunque generis metalli, or de proficuis officii, or de proficuo molendini, or de gurgite, or cursu aquae current'. a loco vocat' H. infra & per terr' voc' K. ad molend. vocat. B. or de weru sive veda in D. And fines of all these and such like things are good, but a fine that is levied of a thing not certain, as de tenemento or de hereditamento, or the like, is void (i).

* P. 11.

A fine may be of a rent-charge which had no being before (k), or of a chief rent or other rent which had a being before, but not of annuity (l), and a rent will pass by the number of the things to be rendered, as de decem librat. decem marcat. sex denar' or quinque solid' or uno obolario. As precipe A. quod reddat B. con. &c. de 4 librat' reddit. & red. dimid' unius librae piperis, ac reddit. unius paris chirothecarum, sagittae barbatae. unius par' calceorum, unius vomeris, 1 lib. cere, 1 lib. piperis, 1 lib. cumini, 1 clavi gariophylli, 1 rosae rubrae, 1 acus & filii, quarterii frumenti, unius quarterii hordei, 2 bracei caponum, 40 gallorum, 20 gallinarum, mille ovorum et aucarum. An honor

21 E. 3. 44.
28 E. 4. 22.
West. Symb.
844.

(k) Or at least voidable for the uncertainty of the words; the proper word to express a tenement, a fine, being messuagium; and therefore a fine levied de uno messuagio will be good. Brown, 23.

(l) A fine of the lands out of which a rent-charge issues will bar an entail in the rent-charge, see v. Saunders, Cro. Jac. 700. and 1 Ves. 391.

This is to be understood of a mere personal annuity, and not of an annuity charged upon lands, and, more properly speaking, indeed, is called a rent-charge. It is presumed, however, that a writ upon a writ of annuity would bind the interest of the parties in the annuity. See Roll.

may pass by the name of a manor, or by its own proper name, as *de honore de Tickhill*, or *de manerio de Tickhill*: so other things may most of them pass by their own proper names, as *de castro vicecomitatus de S. in insula de D. hundred de D. burgo de D.*

A manor may pass by its proper name without naming of the town or place, towns or places wherein it doth lie, as *de manerio de D. cum pertinen' (m)*. 19 E. 4. 9.

Other things may pass in fines by the same names they are granted in deeds, as *de scit. ambit' et precinct' nuper monasterii de D. scit. manerii de D. grangia de D. parco de D. prabend' de D.*

A castle or hundred may be parcel of a manor and pass by the name of the manor whereof they be parcel, and one manor may be parcel of another manor, and pass by the name of that manor, or *a castle may pass by its own proper name, as *de castello de S. cum pertinen'* so also may a hundred pass by its own name, as *de hundred de S.* 26 Ass. p. 54.
2 E. 3. 36.
1 E. 3. 4.
27 H. 6. 2.

* P. 12.

A view of frank-pledge and such like thing may also pass by their own names, as *de vis. frank' pleg' bonorum et cattallorum, waiviorum, felon' fugitivorum, utlagat. in exigend' positurum, felon' de se, deodand. thesaur' invent' ac extrahur' cum pertinen' in M.* West. ubi supra.

By the name of a messuage may pass a house, a curtilage, a garden, an orchard, a dove-house, a shop, a mill, as parcel of the same. The like of a cottage, a toft, a chamber, a cellar, &c. Yet these may pass by their own single names also, as *de uno messuagio, uno curtilagio, &c.* Plow. 169. 171.

A chappel or an hospital must be demanded in a fine, and may pass by the name of a messuage. 13 Ass. pl. 2.

A reversion of land may pass by the name of a reversion, or by the name of the land itself. 43 E. 3. B. 1.

A foldage may pass by the name of *De libertate unius faldagii et cursu ovium cum pertinen'* in F. or *de libero faldagio ovium cum pertinen'* in F. or *de libera fald.* West. ubi supra.

Land, meadow, or pasture, wood and the like, may pass by a certain number of acres (n), or by the certain measure of the superficial quantity thereof, as *de hida, curtacata, bovata, virgata, acru, roda, furlinge terre*: house-boot, hay-boot, and plow-boot, may pass by the name of estovers, as *de rationabili estoverio in boscis, viz. in decem acris bosci ipsius A. in D.* And a fishing may pass by the name of *separali piscar' in aqua de S.* 16 Ass. 9.

And high-wood and underwood may pass by the name of wood, as *de 20 acris bosci, &c.* West. Symb. ubi supra.

Parsonages, rectories, advowsons, vicarages, or tithes impropriate (o), pass not by the names *de advocacione ecclesie* West. Symb. ubi supra.

(m) Under the denomination of a manor, a reputed manor will pass. 13 Vin. Abr. 281. And where a fine is levied of a manor *with its appurtenances*, lands, reputed parcel of the manor, will pass. 13 Vin. Abr. 281.

(n) Where a fine is levied of so many acres of land, the acres are to be considered as customary acres, and not acres according to the statute. *Waddey v. Newton*, 8 Mod. 276. *Sir John Perry's case*, 6 Rep. 67 a.

(o) Upon the dissolution of monasteries, in the reign of Henry the Eighth, many rectories, parsonages, tithes, and other ecclesiastical benefices came to the crown; and the crown having made considerable grants to lay persons, an act was passed (32 Hen. 8. c. 7.) in order to enable the owners of

eclesia but *de rectoria ecclesiæ de S. cum pertinen'*. But when the fine is but of a presentation to a church only, it must be *de advocacione ecclesiæ de S.* and not *cum pertinen'*, and of all vicarages endowed the writ must be *de advocacione vicariæ ecclesiæ de S.* and not *cum pertinen'*, and where no vicarage is endowed, it must pass under these words, *de advocacione ecclesiæ de S. &c.*

If part of an entire thing pass, it must pass by these words, *de medietate, tertia parte, quarta parte, &c.* as the case is, as *de duabus partibus in tres partes dividend.* 8. *acr. terræ*, or *de medietate omnium decimarum, granorum et feni de ter' vocat le Blacklands cum pertinen. in H.* But if an entire thing as a manor or messuage be parted, as if the manor of *S.* be divided into two parts (if the division be so made that the manor of that part be not extinct), and a fine be to be levied of a part of it, it must pass by the name of the whole, as *de manerio de S.* So if a messuage and 23 acres be parted, the part divided shall pass by the name of one messuage and ten acres of land, and not by the name *de medietate unius messuagii & viginti acr' ter'*. And if things be otherwise named than as before, sometimes the fine will thereby lose its force in all, and sometimes in part: but if a thing be twice named in a writ of covenant, as a manor, and a hundred parcel of the same, this will not hurt the fine.

*P. 13.

Broo. Fines,
44. 91. 9 E. 4.
6

The things that do pass by the fine must be named to lie in the shire, town, parish, or hamlet, where it doth lie, for a fine is good, albeit it name the lands to lie in the hamlet, or in a town decayed; but it is good to name the town wherein the hamlet is, and that with addition for distinction if there be divers towns of the same name in that county. And if a manor extend into divers towns, as into *A. B.* and *C.* it is good to express all or none, as *de manerio de S. in A. B. and C.* For if any of the towns be omitted, none of the manor in that town will pass, but if the fine be of the manor of *S. cum pertinen'* and say not where it lieth, this fine will carry the whole manor. And if there be divers manors of one name, as *South S.* and *North S.* or the like, it is safe to set down in the writ for the fine which manor is intended to be passed, howsoever the fine may be good of the manor intended to be passed without the distinction(p).

The

of such possessions to exercise every act of dominion over them, and to put them, in fact, upon the very same footing with lay possessions. By the express words of the act, *fines* may be levied of such ecclesiastical possessions.

(p) If a person has two manors of the name of *A.* and he levies a fine of the manor of *A.* generally, without distinguishing it from his other manor of the same name, evidence may be adduced to shew which manor was intended. Gilb. Ev. 38. Bull. N. P. 297. And where a fine is levied of a certain number of acres in *A.* and the consor has a greater number, the conusee may elect upon what part of the estate the fine shall operate. 13 Vin. Abr. 275.

In describing the parcels in a fine, the vill or hamlet, parish or place, in which the lands lay, ought to be mentioned. It has been held, however, that a fine may be levied of lands of a *known name*, without mentioning any parish, vill, or place, within which they lie. See *Monk v. Butler*, Cro. Jac. 384. *Forsyth v. Easton*, Cro. Car. 269. 276. and see 4 Taunt. Rep. 349. If there is a vill and a parish, both of the name of *A.* (the vill laying within, but not being co-extensive with the parish), and the lands extend beyond the limits of the vill, the parcels ought to be described as lying within the parish of *A.*; for if they are only described to be in *A.* generally, without saying whether within the parish

The order of placing things in fines is, First, to set down the most worthy things before things less worthy, as a manor before a messuage, a castle before a manor, a house before land, arable land before meadow, meadow before pasture, &c. Secondly, to set down things general before things special; as land, being the *Genus* of meadow, pasture, wood, &c. before them; wood, being the *Genus* to wood-grounds, as *alnetum, salicetum*, before them. Thirdly, to set down entire things before parts of things, as *de manerio de S. & medietate manerii de B.* Fourthly, to set down particular things after this manner;—

suagium, tum, lendinum, umbare, dinum, ra, tum, tura, cus, ra Mes, Tof, Mo, Col, Gar, Ter, Pra, Pas, Bos, Brue, Mora, ria, cus, tum, caria, ditus; Junca, Maris, Alne, Rus, Red, Sectare, priora.

And yet if this order be not observed, but the things be otherwise placed in the writ, if it be suffered to pass, the fine will be good enough.

4. In respect of the estate of the parties thereunto.

If either the cognisor or cognisee, at the time of the fine levied, be seised of any estate of freehold in fee-simple, fee-tail, or for life, in possession, reversion, or remainder, whether the same be by right or wrong, the fine will be a good fine in this respect (q). And therefore

Stat. 27 E. 1. c. 1. 41 E. 3. 14. 44 E. 3. 36. 39 E. 3. 16. 17 E. 3. 62. 24 E. 3. if 26.

parish or vill, only such of the lands will pass as lie within the vill (see *Stork v. Fox*, Cro. Jac. 120, and see *Cotterell v. Franklin*, 6 Taunt. 284.), unless the jurisdiction of the constable of the vill extends throughout the parish. See *Waldron v. Rosecarriott*, 1 Mod. 78. 1 Vent. 170.

Fines, however, being now considered merely as common assurances, the courts are not extremely strict about the description of the parcels, but attend to the intention of the parties respecting them; and this they generally ascertain by referring to the deed declaring the uses of the fine; and they will amend the parcels by the deed of uses, although it is executed subsequent to the levying of the fine. *Rowlett v. Orlebar*, 6 Taunt. 73. Where the intention, however, is not rendered perfectly clear by the deed of uses the court requires an affidavit of the intention. *Wheler v. Hesilpine*, 2 Bos. & Pul. 560. *Dowse v. Reeve*, *ibid.* 579. If the deed of uses does not describe the parcels, but merely refers to a description of them in a former deed, the court will equally amend the fine as if the deed of uses itself had described the parcels. *Gill v. Yeates*, 4 Taunt. 708. When the fine is to pass the estate of a married woman, the parcels cannot be amended by the deed of uses. See *Powell v. Peach*, 2 Blackst. Rep. 1202. See further on amending parcels in a fine by the deed declaring the uses of the fine, *Tregare v. Gwyns*, Pig. Rec. 218. *Forster v. Pollington*, Barnes, 216. *Cargill v. Pattison*, *ibid.* 24. *Bokun v. Burton*, 3 Wils. Rep. 58.

Where the parcels in a fine are sufficient to cover the lands intended to be passed, the court will not alter the parcels by increasing the number of acres so as to make the lands of each distinct quality equal in amount to the whole of the lands. As for instance, where the lands amount to thirty acres, being partly arable, partly meadow, partly pasture, &c. the court will not alter the fine, and make it, thirty acres of land, thirty acres of meadow, thirty acres of pasture, &c. *Bertrum v. Town*, 6 Taunt. Rep. 58. A fine will not be amended by adding lands in a parish which is not mentioned in the deed declaring the uses. *Cotterell and Franklin*, 6 Taunt. Rep. 284. See *infra* as to amending parcels in a recovery, for wherever the court would amend the parcels in a recovery, it is presumed they would amend them in a fine.

The court will not only amend the parcels in a fine, but where any palpable error or mistake is made in the proceedings in the fine, as the entry of the king's silver, the proclamations, &c. the court will order such error or mistake to be corrected. *Bokun's case*, 5 Rep. 43. *Dowlin's case*, 5 Rep. 44. *Peters v. Goodalve*, 13 Rep. 54. *Stelley's case*, Hutt. 122. A mistake, however, in the original writ upon which the fine has been levied will not be amended. See *Pembroke v. Jefferies*, 1 Salk. 52. Cas. Temp. Holt, 59; and see Lord Raym. 1066. and *Lindsay v. Gray*, 2 Blackst. Rep. 1013; nor, where the fine is recorded as a fine of one term, will the court alter it and make it a fine of another, *Henth v. Wilmot*, 2 Blackst. Rep. 778; neither will the court amend fines by altering the Christian names of the parties. *Dixon v. Lawson*, 2 Blackst. Rep. 816.

(q) And it is not merely where the parties have a legal estate of freehold in the lands that a fine may be levied, for a fine may be equally levied of an equitable or trust estate. See 1 Cas. in Ch. 268, 278.

if one that is seised of land in fee-simple, or fee-tail, general or special, levy a fine of this land to a stranger, this is a good fine. So if a stranger levy a fine to him of this land, this is a good fine. So also a fine, levied by, or to, a tenant for life of the land he doth so *hold, is good in this respect: but he must take heed of a forfeiture in this case; for if tenant for life levy a fine *sur cognissance de droit come ceo*, &c. to a stranger, or levy a fine *sur grant & release* to a stranger, to hold to the cognisee for a longer time than for the life of the tenant for life, howsoever in this case the fine be a good fine, yet this is a forfeiture of the estate of the tenant for life, whereof he in reversion or remainder may take present advantage (r). And yet if such a tenant for life levy a fine *sur grant & release*, to hold to the cognisee for the life of the tenant for life; or grant his estate by such a fine to him in reversion or remainder; or by fine grant a rent out of the land for longer time than for his own life; in these cases the fine is good, and there is no forfeiture of the estate of the tenant for life. So likewise if a fine be levied to a tenant for life by a stranger, who doth thereby acknowledge all his right to be in the tenant for life, and release and quit claim to him and his heirs, and go no further, this is a good fine, and no forfeiture of the estate of the tenant for life; for his estate

* P. 14.
Forfeiture.

1 H. 7. 22.
Co. 2. 56. 9.
106.

278. 1 Freem. 311. At one time, however, an opinion seemed to prevail, that in order to transfer a mere equitable interest in lands, there was no absolute necessity for a fine or a recovery, not even to destroy an equitable entail. The earlier cases (*North v. Champarnon*, 2 Ch. Ca. 64. *Carpenter v. Carpenter*, 1 Vern. 440. *Baker v. Bailey*, 2 Vern. 225. *Hopkins v. Hopkins*, 1 Atk. 591. *Beverley v. Beverley*, 2 Vern. 132.), are clear as to a fine or recovery not being necessary; but the later authorities are the other way. *Kirkham v. Smith*, Amb. 518. *Radford v. Wilson*, 3 Atk. 815. *Leggatt v. Sewell*, 2 Vern. 452. 1 P. Wms. 91. *Harvey v. Parker*, 10 Vin. Abr. 266. Lord Rosslyn, however, in the cases of *Barnaby v. Griffin* (3 Ves. 277.), and *Fletcher v. Tollett* (5 Ves. 13.), though he seemed to recognise the authority of the cases in which a fine or recovery had been held to be necessary, yet at the same time he expressed his dissatisfaction with them. It may be observed, too, that the case of *Kirkham v. Smith* is the only one the editor has met with, which contains a direct decision that a fine or recovery is necessary; and it is worthy of remark, that in this case the parties who claimed under the settlement, which it was contended had destroyed the equitable entail, were mere volunteers. It is true the decision does not appear to have turned upon that circumstance, but it may perhaps be thought that it takes from the weight of it; and except this case there does not appear to be a single one which can be fairly looked upon as an authority for holding, that a deed or agreement entered into by an equitable tenant in tail, for a valuable consideration will not bind the issue in tail or remainder-man.

But although it might not be improper to hold that the issue in tail and remainder-man should be bound by a deed or articles entered into for a valuable consideration, yet a distinction ought probably to be made between a deed or agreement for a valuable consideration, and a mere voluntary deed. The former might be considered as binding on the issue and remainder-man, and the latter as not binding. And this it is conceived might be done without violating any rule or principle of equity: for an equitable estate-tail being a mere creature of the court, the court, it is apprehended, may so treat and dispose of it as best to remove the claims of justice. For the sake, however, of giving the remainder-man, or reversioner, the same chance in an equitable estate-tail, that he would have had in case it had been a legal one, it might be proper to allow such deed or agreement, if executed out of term time, the same operation as if a fine would have had; and so likewise if it was entered into by a person who had only an equitable estate-tail in remainder; unless indeed the person who had the equitable freehold was a party to the deed or agreement. But where the deed or agreement is entered into by an equitable tenant in tail in possession, and that too in term time, then it might be considered as having the operation of a recovery. However, until it is settled that a mere deed or agreement will bar an equitable estate tail and remainders over, a fine or recovery (according to the circumstances of the case) should always be resorted to, unless where there has been a decree in equity against the tenant in tail, for a decree in equity against an equitable tenant in tail is of equal force with a fine or recovery. See *Lloyd v. Jones*, 4 Ves. 64.

(r) But he is not bound to do so, and therefore the law gives him five years after the death of the tenant for life, because he has no reason to look until the natural determination of the estate. *Per Lord Hardwicke*, 2 Ves. 482. See also *W'halley v. Turner*, 2 Lev. 52.

the issue in tail may be barred by way of estoppel, by a fine levied by ancestor being tenant in tail; albeit neither consor nor consuee have any estate of freehold in the land (w). *A joint-tenant, tenant in common, or coparcener may levy a fine of his part to a stranger, and this will be a good fine. And so also, as it seems, may one coparcener, or tenant in common, to another (v).

* 26 H. 8. 9.
Dyer 334. 69.
Plow. 375. 238.
E. 4. 13.
11 Ed. 4. 68.

One single member of a corporation aggregate of many cannot levy a fine of the lands of the corporation; as a mayor, or the master of a college, cannot levy a fine without the commonalty, or his fellows, &c. (w). But such persons may levy fines of the lands they are solely seised of in their own right, as other men may do.

* P. 15.

*Such as have estates of freehold in ecclesiastical lands in the right of their churches, houses, &c. as bishops, deans and chapters, prebendaries, parsons, and the like, may not levy a fine of such lands; for if they do, it will not bind the successor.

Co. 11. 78.

He that hath an estate of fee-simple in lands in the right of his wife, ought not to levy a fine thereof without her; and if he do, she and her heirs may avoid it after his death (x). Also he that hath an estate of lands given in tail by the king, or by the provision of the king, ought not to levy a fine of this land, for it is void as against the issue in tail and the king (y). Also he that hath an estate of lands that are prohibited to be sold by act of parliament, ought not to levy a fine of such land. Also she that hath

Stat. 32 H. 8.
c. 8. 12 E. 4.
12. Co. 6. 53.
Broo. Fines,
121. Stat.
32 H. 8. c. 36.
Co. 5. 3. 4.
Stat. 1 H. 7.
c. 20.

(u) A fine by a person with the mere possibility of an estate tail will in no case, it is conceived, bar the estate tail. See page 26, note (i).

(v) The possession of one joint-tenant, tenant in common, or coparcener, being considered the possession of the other, a fine of the whole estate, levied by one of them, does not amount to an ouster of the other, and will not therefore operate as a bar to the other. *Peaceable v. Read*, 1 East's T. R. 566. *Ford v. Lord Gray*, 6 Mod. 44. 1 Salk. 285. But if one joint-tenant, tenant in common, or coparcener, should hold possession of the whole of the estate, without accounting to the other for his share of the profits and denying his title, this would be considered as amounting to an ouster or disclaim; and a fine of the whole estate (with proclamations and non-claim) levied after such ouster, would, it is presumed, operate as a bar. See *Doe v. Prosser*, 1 Cowp. Rep. 217, and *Doe v. Bird*, 11 East's Rep. 49.

(w) Nor even with the commonalty; for Lord Coke says, (Co. Read. 7), that corporations aggregate cannot levy fines, because, as they are invisible bodies, they can only appear by attorney; whereas the stat. de modo levandi fines requires that the parties to a fine shall appear personally before the judges. He observes, however, that a sole corporation may acknowledge a fine.

But though a corporation aggregate cannot levy a fine, yet if a lay corporation aggregate, which had power to alienate its possessions should be disseised, or should make a conveyance which was void, either from a misnomer of the corporation or otherwise, and the disseisor or purchaser should levy a fine with proclamations, and there should be five years non-claim, the corporation would be barred. *Craft v. Howlett*, Plowd. 536. And though ecclesiastical corporations are restrained from alienating their possessions for any longer time than three lives or twenty-one years, yet the head of an ecclesiastical corporation aggregate may be barred by fine and non-claim during the time he continues such head, and each succeeding head will be barred, unless he avoids the fine within five years after his right accrues. *Magdalen's case*, 11 Rep. 78 b. *Howlett v. Carpenter*, Vent. 311. 3 Keb. 775; and the same is the case with respect to ecclesiastical corporations sole, as bishops, parsons, and vicars. Plowd. 536. A similar rule, too, applies in the case of lands annexed to offices held for life.—A fine and non-claim will bar the officer, who, for the time being, holds the office, and his successor will be also barred, unless he avoids the fine within five years after his title accrues. In the case of the king (who is a corporation sole) a fine and non-claim does not operate as a bar. 11 Co. 74. Co. Litt. 90.

(x) Though by the acts of the 11 H. 7. c. 20, and the 32 H. 8. c. 28, husbands seised *jure uxoris* are prohibited from levying fines, and yet it has been held, that if a man levies a fine of his wife's lands, and she suffers five years to pass after his death without entry or claim, she and her heirs (if she was free from disability) will be completely barred. 8 Rep. 72 b. Dyer, 72. Though query whether he has alone such an estate of freehold as will support a fine; it being said that he and his wife, in her right, are seised, and not that he alone is seised in her right.

(y) See further in the Chapter on Recoveries relative to estates *ex provisione corone*.

an estate of lands of her husband, or of any of his ancestors, assured to her for her jointure, dower, or in tail; by the means of her husband or any of his ancestors, may not levy a fine of this land, for if she grant a greater estate than for her own life, this worketh a present forfeiture (z).

West. Sym.
ubi supra.
sect. 30. Co.
§. 38.

In the concords of fines some things are to be regarded in the manner and form, and some things in the matter and substance. First, when a fine is levied to divers cognisees, the right shall be limited to one of them (a). As if a fine be levied by A. to B. and C. it shall say, *Quod prædict' A. recognoverit tenementa prædict' esse jus ipsius B. ut ill' quæ iidem B. et C. habent, &c.* But the king's tenant may acknowledge the right to be in divers. Secondly, the estate shall be limited to his heirs only to whom the right is limited, and not to the heirs of all the cognisees, as thus, *Quod prædict' A. cognoverit ten' præd', &c. esse jus ipsius B. ut ill' quæ iidem B. & C. habent de dono prædict' A. & ill' remisit & quiet' clam' de se & hæred' suis præfat' B. et C. et hæred' ipsius B. &c.* The release and warranty must be from the heirs of one of the cognisors, where there be more than one; for in a fine from divers the fee is supposed to be in one only, and therefore it must be thus; *Quod prædict' A. & B. cogn' &c. & ill' remis' &c. de se & hæred' ipsius A. &c. Et iidem A. et B. concesserunt pro se et hæred' ipsius A. quod ipsi war' tenementa, &c. contra se et hæredes ipsius A. in perpetuum.* But if the fine be of lands in gavelkind *contra* (b). Fourthly, the concord need not to rehearse all the special names of the things contained in the writ, but it is sufficient to say, *Tenementa prædicta, as quod prædict' A. recognoverit tenementa prædicta, &c.* Fifthly, as a concord cannot be without an original writ, so it must pursue the original writ, and cannot be of any foreign thing, i. e. such a thing as is not contained in the writ, except it be consequent thereunto, as when the writ is of land, there may be in the concord of a rent out of this land; but there may be more things in the *Precipe* than are named in the concord. A concord may be with an exception of some part; but this exception must always be of such things whereof the writ will lie and are mentioned therein, *must be certainly named, and must succeed the things out of which they be excepted, as *precipe A. B. quod teneat C. D. convenc', &c. de manerio de D. cum pertinen' in C. (except' uno messuagio, duabus acris terræ, et advocacione Ecclesiæ de C. &c.) Et est concordia, &c. quod præd' A. cogn' tenementa prædict' cum pertinen' (except' præexcept).* And in all these and such like cases, as before, where the concord is not formal, the judges ought not to receive the fine nor suffer it to pass; but if they do, and the fine be finished, it cannot afterwards be avoided by writ of error, or otherwise, for these faults.

5. In respect of the concord and matters touching it; and what concord or agreement may be made by fine, or not.

* P. 16.

(z) See page 28, n. (g), respecting fines levied by persons seized *ex provisione viri*.

(a) But it is said, that a fine levied to two and their heirs will nevertheless be good. 2 Mod. 49.

(b) Unless executed in the life of the tenant in tail. See Chet. 6. and 27.

One may grant his tenements which *H.* doth hold for life, and which after the death of *H.* ought to remain to him, to *H.* for life, rendering rent with clause of distress, saving the reversion, and a fine of this form is good.

44 Ed. 3. 45.

The manors and tenements contained in the writ may be divided, as if a fine be levied between *A.* and *B.* of two manors, and *B.* doth acknowledge all his right of the said two manors to be the right of the said *A.* as that which, &c. for which *A.* doth grant and render one manor to *B.* for life, with two parts of the other manor which *N.* holdeth in dower, to have the one manor and two parts of the other manor to *B.* for life, the remainder after his death to *A.* in tail, and that after the death of *N.* the third part shall remain to another. So if a fine be levied of the manor of *G.* with the appurtenances by *A.* unto *C.* which *A.* acknowledgeth the right in *C.* as that, &c. and *C.* granteth and rendereth the same to *A.* in tail, the remainder of the fourth part of the manor towards the west to the said *A.* and her heirs, the remainder of another fourth part towards the east to *I.* in fee and so of the other two fourth parts; or uncertainly by 3. third parts in remainder to *A.* *B.* and *C.* in remainder severally; and these are good concords.

44 Ed. 3. 11.
45 Ed. 3. 12.44 Ass. Ple. 11.
Bro Fines 111.

If *T.* and *E.* his wife levy a fine to *R.* *D.* and *T.* *C.* of divers manors and lands in *A.* *B.* and *C.* and in the fine there are divers grants and renders, and one grant and render is of the manors of *A.* and *B.* and the lands therein to *T.* and *E.* and the heirs of *T.* and in another render 100 acres parcel of one of the same manors is granted to *E.* in tail, the remainder to the right heirs of a stranger, notwithstanding this seeming repugnancy, the record and consequently the whole fine is good.

Co. 5. 38.

6. In respect of the manner and order of levying it, and other matters.

The fine must be levied and sued forth in that manner and order as before is set forth, for if it be not so, but that there want an original writ, or if there be one, it doth bear *tote* after the *dedimus potestatem*, or the like, it will be a defective fine, and either *ipso facto* void, or at least voidable by writ of error.

See before.

If any one of the consors die before the consuance be certified after it is acknowledged and taken, the fine cannot now be made a good fine, and yet if the commissioners shall certify this consuance with an antedate, and so the fine be finished, this may be a good fine at the common law, but perhaps may be avoided by sentence in * the star-chamber (e). But if the consuance be certified and the king's silver paid to the king before the death of the consor, the fine may be engrossed and finished after his death well enough, and it will be a good fine (f). And if a feme sole make a consuance of a fine, and before it be certified and engrossed she take a husband, this will not let but the fine may be finished, and albeit it be recorded and sued out in her name as sole, whereas in

Dyer 220. 254.
Crom. Jur 92.
Dyer 246.

* P. 19.

(e) The jurisdiction of the court of star-chamber was taken away by the act of the 16 Car. 1. c. 19.
(f) See supra, page 3, notes (d) and (e), relative to suing out the original writ, paying the king's silver, &c.

truth she is covert and of another name, yet is the fine a good fine, however in this case it is not amiss to get a release of errors from her husband (g).

West Sym.
ubi supra.

Lands that are bought of divers persons may pass by one fine, and then the writ of covenant must be brought by all the vendees against all the vendors, and they must every one of them warrant for himself and his heirs, and such a fine is good (h).

Dyer 227.
15 Ed. 4. 33.

If land lie in divers shires, it may be contained in one concord, and good enough, but there must be several writs of covenant in every county, else the fine will not be good.

Ca. 3. 78. 8. 9.
105.

If a fine be levied of covin by a lessee for years, or life, or a copyholder, of purpose and with an intent to bar him in reversion, or the lord of his inheritance; this is of no force, and therefore *non-claim* within five years will not hurt in this case (i): So that it seems a fine or recovery *Usury* may

Ca. 3. 80.
16 H. 7. 5. see
infra in Deed.

(g) With respect to fines by married women, it may be proper to state, that when the husband has entered into a covenant for a valuable consideration, that his wife should join him in levying a fine, courts of equity have enforced a specific performance of such covenant. *Hall v. Hardy*, 3 P. Wms. 180. It would seem however that this ought only to be done, where the wife refuses to join by reason of the persuasion or influence of her husband, for if the husband has imprudently entered into a covenant which he finds it impossible to perform, it would be pushing the jurisdiction of a court of equity to a length utterly inconsistent with equity to punish a man for not doing an impossibility; and even if the committal of the husband might be the means of inducing the wife to join in the fine, still it would appear not to be very consonant to equity, to make her do that which might be highly prejudicial to her. In short the only case, it is conceived, in which the court ought to compel the husband to procure his wife to join in a fine where he has covenanted to do so, is, where there is reason to believe that it is the husband himself, and not the wife, who wishes to avoid the performance of the covenant.

(A) And such joint fines (though they are *ex gratia*) seem reasonable where the several purchases are of small value. See Wils. 47, where an order of Lord Chancellor Hatton is noticed, authorizing the curitor to stay the writ when there is more than one demandant and one forfeccant, except coparceners, joint-tenants, and tenants in common; but the present practice at the curitor's office is to allow two separate purchases to be comprised in one fine, on an affidavit that the value of them together does not exceed £200: but this practice is mere matter of regulation at the curitor's office, and not the result of any positive law, and therefore if departed from the fine will be good.

(i) A lessee for life has an estate of *freehold*, and therefore if he levies a fine with proclamations, such fine will be a bar to the remainder-man, if free from disability, unless he enters within five years from the time of levying the fine or from the death of the lessee. But if a lessee for years, tenant at will, by elegit, statute merchant or staple, or a copyholder, who have no estate of freehold, should levy a fine to a stranger, such fine will only bind the parties themselves, and may at any time be defeated by the real owner of the estate, by pleading, that *neither of the parties had an estate of freehold in the lands when the fine was levied*. But if a copyholder or tenant for years makes a feoffment, it is said, that an estate of freehold is acquired by means of such feoffment, and that if he afterwards levies a fine with proclamations he may acquire the fee by means of such fine. This doctrine however has been called in question, not only as a doctrine evidently founded in injustice, but as untenable on principle. See *Taylor v. Horde*, 1 Burr. 6. Cowp. 689.

Supposing, however, the doctrine to be founded on principle, yet in order to give the feoffment and fine the operation ascribed to them, the feoffment must be made (and the deed of feoffment should bear date) at a time antecedent to the term of which the fine is levied. If for instance the feoffment is made in vacation the fine should not be levied as of the preceding, but of the following term.

If a copyholder should attempt to acquire the fee by means of a feoffment and fine, the lord, if free from disabilities and seized in fee, would only have five years to avoid the fine in; but if the manor happened to be previously in settlement, and the person who was lord at the time the fine was levied was only tenant for life, he and each successive remainder-man would have a distinct period of five years in which to avoid it. If the lord after a forfeiture by a tenant, conveys away his estate, neither the grantor or grantee can take advantage of the forfeiture. See *Fenn v. Smart*, 12 East's Rep. 444. And in the case of a feoffment and fine by a lessee for years, if the reversion is in settlement, the particular tenant and each remainder-man would have two periods in which to avoid the fee; one period of five years immediately after the levying of the fine, and another after the expiration of the term. See *Whalley v. Tuncred*, 1 Ventr. 241. T. Raym. 219. 1 Atk. 571. When, therefore, it is considered that the attempt to acquire a fee by means of a feoffment and fine cannot be justified on any principle of moral honesty, whatever it may be on the strict principles of law, and when,

may be covinous and avoidable for covin as well as a deed, and therefore that a fine or recovery levied or suffered of fraud to deceive purchasers or creditors will be void as to them as well as any other conveyance. So also a fine or recovery levied or suffered in execution or pursuit of an usurious contract may be void by the statutes of usury, as well as a feoffment or other conveyance by deed. But a fine or recovery shall not be said to be levied or suffered *per duress*, and avoided for that cause.

Duress.

7. How the concord of a fine shall be expounded and taken.

The conveyance of a fine, and a grant and render therein shall be expounded and taken as a charter or other conveyance between party and party, because it is a conveyance upon record, and not as a writ or judgment upon record (*k*). And therefore if *A.* and *B.* by fine acknowledge the manors of *S. T.* and *W.* to be the right of *C.* and *C.* doth render the manors of *S.* and *T.* to *A.* by one render, and after by another render limit 100 acres, parcel of the manor of *S.* to *B.* this shall be a good concord, and be expounded according to the intent of the parties, viz. That *B.* shall have the 100 acres, and *A.* all the residue of the manor.

Co. 5. 38. See in exposition of Deeds infra

Deed.

If a fine be levied to two men & *heredibus*, without the word [*Swis*] this is void for incertainty in a fine as it is in a deed.

37 H. 6. 5.

Recovery.

If a fine be levied *come ceo que il ad de son done*, hereby a fee-simple will pass without any word of heirs. And so also it is in case of a common recovery.

Co. super. Lit. 9. Frederick vers. Wakefield's case. Trin. 36 Eliz. Co. B.

*** P. 20.**

If the lands be limited in the concord of a fine to *B.* for life, and after to the children of *C.* begotten, and *C.* hath at the time of the * fine levied two daughters only, in this case the sons and daughters that are born after shall take nothing by this fine. And no averment of intent will help in these cases. And yet an averment lieth upon a fine of the uses thereof and of no other matters as upon a deed (*l*).

Averment.

8. What persons and what estates shall be barred by a fine, or a fine and non-claim:

A fine at the common law, or a fine without proclamations, was once a perpetual bar to all persons that had right and no impediment at the time of the fine levied, and that did not claim within a year and a day after the execution of the fine by possession; but now this law is changed, and this

Stat. 18 Ed. 1. de finibus. Stat. 34 Ed. 3. 16. Plowd. 373. Stat. 4 H. 7. c. 24.

when, too, it is considered that the copyholder or lessee forfeits his estate by levying such a fine, and that the chance of his gaining a valid title to the fee are greatly against him, no one, it is presumed, would think of advising a copyholder or tenant for years to attempt to acquire a fee by any such means. Where the lessee, indeed, *previous* to the feoffment and fine, assigns his term to a trustee, there it is understood that a forfeiture of the term is prevented.

Before quitting the subject under consideration, (the necessity of having an estate of freehold, either by right or wrong, in order to gain or confirm a title by non-claim), it may be proper to state, that such an estate is not acquired by a lessee *per autre vie* holding over where no claim or demand is made upon him for rent or for the land itself: nor does his personal representative acquire an estate of freehold by entering and holding possession where no such claim or demand has been made. See *Doe v. Perkins*, 3 Maule & Selw. 271.

(*k*) The fine and render is a conveyance at common law, and the render makes the conveyance a new purchase as much as a feoffment and reinfestment at common law. *Price v. Longford*, 1 Salk. 337. 1 Show. Rep. 92. And if the conveyance was seized in fee (or in tail, with the immediate reversion in fee) *ex parte materna*, the descent would be altered, and the estate would afterwards go *ex parte paterna*. *Price v. Longford*, ubi sup. But it is only the fine *sur done grant et render* that will alter the descent. See 1 Salk. 590. 2 P. Wms. 139. 2 Wils. 19.

(*l*) Since the statute of frauds (29 Car. 2. c. 3.), declarations of the uses of fines must be in writing, but where there is no express declaration of the use the conveyance may aver the use in himself, *Altham v. Anglica*, Gilb. Eq. Cas. 17. *Roe v. Popham*, Dougl. 24.

kind

1 R. 3. c. 7.
22 H. 8. c. 36.

kind of fine will bar none but such as are parties and privies thereunto (m). But a fine by the statute, or a fine with proclamations, is now much of the same virtue and force as a fine at the common law was; for by the statute of 4 H. 7. it is provided, That every fine after the engrossing thereof shall be proclaimed in the court the same term, and the three next following terms, four several days in every term (n), which proclamations so made, the fine shall conclude all parties, privies and strangers, except women covert, persons within 21 years of age, in prison, out of the realm, or *non sana memorie*, (being no parties to the fine) so as they, or their heirs, take their action or lawful entry within five years after these imperfections removed. Saving to all persons and their heirs (other than parties) the right claim and interest which they have at the time of the fine, so as they pursue it by action or entry within five years after the proclamations. And saving to all other persons such right, title, claim and interest, as first shall grow or come to them after the proclamations, by force of any matter before the fine, so as they make their claim or entry within five years after the same grow due, or if at that time there be any impediment as aforesaid, within five years after the impediment removed. And by the statute of 32 H. 8. (which is an exposition of this statute) it is provided, That all fines with proclamations levied according to 4 H. 7. by any person of twenty-one years of age, of any land, &c. before the fine levied entailed to him that doth levy the fine or any of his ancestors, in possession, reversion, remainder, or use, immediately after proclamations had, shall be a bar against him and his heirs, claiming only by force of any such entail, and against all others claiming only to the use of him or any heir of his body (o). By which statute it doth appear that all the parties to the fine, conisors and conisees, whether they be females covert, men *de non sana memorie*, or others, infants only excepted, (who during minority may avoid it) and whether they have a natural or civil capacity; and privies, viz. privies in blood, as heirs, whether they be lineal or collateral, or privies in representation, as executors and administrators; and all strangers also, viz. all others besides parties and privies, that have or pretend any present right * or title, (except women covert, and the rest that have impediment that do make their entry or claim, or bring their action within five years after proclamations

and in what
time: or not:
and how.

* P. 21.

(m) A fine without proclamations is sufficient for the purpose of barring a right of dower, as it is to pass a married woman's estate where she is seized for life or in fee; but where a fine is levied for the purpose of barring an entail, or for the purpose of gaining or confirming a title by non-claim, in either of those cases the fine must be with proclamations.

(n) But by the statute of 31 Eliz. c. 2. a fine need only be proclaimed four times, viz. once in the term wherein it is engrossed, and once in each of the three succeeding terms. See further as to proclamations, *Fish v. Brockat*, Plowd. 265.

(o) Wherever a fine is levied in order to bar an entail, or to gain or confirm a title by non-claim, it must be taken to have the proclamations duly made. It is not, however, necessary to the validity of the fine, that the proclamations should be made in the life-time of the cognisor or cognisee. See *ibid.*, page 3, note (k). Courts of ancient demesne, copyhold courts, and some others, have no power by statute, of proclaiming fines levied in them. The consequence therefore is, that a fine levied in these courts will not gain or confirm a title by non-claim, nor, without a particular custom, bar an entail.

had,

had, and those persons excepted also if they make not their claim, &c. within five years after the impediment removed) all these are included, *i. e.* so shut and closed up together, for their right is so extinct hereby, as they can never open their mouths or lift up a finger against it. Saving to all others, *i. e.* such as have no present right at the time of the fine levied, and were excepted before, such right, title, claim or interest as shall accrue to them after the proclamations upon any trust, gift in tail, or other cause, before the fine levied, so as they make their claim, &c. within five years after their right first accrued if they have then no impediment, or if they have, within five years after the impediment removed.

For a more full understanding of which statutes and this matter, these things in general must first be observed. 1. That the persons, to be barred by a fine are, 'parties. 'privies. 'estrangers. The parties, if they be of the age of twenty-one years, are bound for ever by the fine, and shall have no time to claim to preserve their right (p). The privies also, being heirs and executors to the parties, and void of impediment at the time of the fine levied, or not, if they claim by the same title that their ancestor had that levied the fine, are barred for ever by the fine, and shall have no time to claim to preserve their right. * And therefore if my father disseise my grandfather of land, and then levy a fine of the land, and then my grandfather die, and after my father die, by this fine I am barred of the land for ever. And here note, ^bthat he that is a privy within the intent of 4 H. 7. is an heir within the statute of 32 H. 8. *Et sic e converso*. And that privies or heirs in estate and blood, as he that is heir to whom the land doth or should descend, are within these statutes, and shall be barred by the fine of their ancestor of that land. And so also shall privies in estate that are not privies in blood, as where one hath land in borough-english, and levies a fine of it, hereby the youngest son is barred. So if one be tenant in tail to him and the heirs females of his body, and he levies a fine, having a son and daughter, hereby the issue female is barred, and yet she is not the heir of his blood. But he that is privy in blood only, and not in estate also, is not within these statutes, neither shall he be barred by the fine, and therefore if lands be given to a man, and the heirs females of his body, and he hath a son and a daughter, and the son levies a fine and dies without issue, this is no bar to the daughter, for howsoever she be heir of his blood, yet she is not the heir to the estate, nor shall need to make her conveyance to it by him (q). The strangers that are

^a Dyer, 3.
Pasch. 7.
Jac. B. R.

^b Trin. 21 Jac.
Com. B. Curia
in Will. God-
frey's case.

(p) But if a married woman levies a fine as a feme sole, her husband may avoid it. See page 7, note (w). And whether a fine by an insane person may not also be avoided, is a point perhaps not fully settled. See page 6, note (t).

(q) A fine by tenant in tail bars not only his own issue but also all collaterals claiming under the same entail, for they are privies both in blood and estate, and it will have this effect whether he be tenant in tail in possession, or remainder, *Zouch v. Bamfield*, 3 Rep. 34. 88.; or ever in contingent *Grant's case*, 10 Rep. 50 a. But the fine of a person with the mere possibility of an estate tail is, is conceived, altogether nugatory as a bar to the estate tail. See page 26, note (f). If tenant in tail is disseised, and the disseisor levies a fine with proclamations, and five years elapse without entry or claim by the disseisee, not only the disseisee and his issue, but also collaterals claiming under the same entail will be barred, unless the disseisee was under some disability.

to be concluded by the fine are either; 1. Such as have present right and no impediment; and these are barred * if they make not their claim within five years after the proclamations. 2. Such as have present right, but have impediment of infancy, &c. and these are barred if they do not make their claim within five years after the impediment removed. 3. Such as have no present but future right upon cause precedent, and they are either without impediment, and then they are barred if they claim not within five years after their right doth accrue; or they have impediments, and then they are barred if they claim not within five years after the impediment removed (r). 4. Such as have neither present nor future right at the time of the levying of the fine by reason of any matter before the fine, but whose right groweth either entirely after, or partly before, and partly after the fine, and these are not barred at all by the fine, but they may make their claim, &c. when they will (s). And parties, privies, and strangers to fines that are barred thereby, are such as have natural capacities or civil, for both these are barred. And therefore it is held, if such a corporation as hath an absolute estate and authority of his possessions so as he may maintain a writ of right thereof, as mayor and commonalty, dean and chapter, &c. levy a fine of their lands, they and their successors are barred presently; but if a bishop, dean, or prebend, without assent of the dean and chapter, or a parson and vicar without assent of the patron and ordinary had levied a fine, this would not have barred the successor; neither will it bar now with their assent, for they are restrained by divers statutes. So also such per-

* P. 22.

Plow. 598.
337. 375. 378.

(r) And by the 4 of Ann. chap. 16. sect. 16. no claim or entry to avoid a fine with proclamations will be sufficient, unless within one year after such claim or entry is made an action is commenced and prosecuted with effect. An entry to avoid a fine, in order to be effectual, must be made for that express and declared purpose. Where a fine is levied by a person with a mere equitable estate, other persons with mere equitable estates must avoid the fine by bill in equity.

(s) A recent case (*Goodright v. Forrester*, 1 Taunt. 578.) has denied (and properly, it is conceived,) that they may make their claim when they will. Indeed, no such case, as a case where the right grows either partly or entirely after the fine is levied, can possibly arise. Every right, either primitively or derivatively, must have existed before the levying of the fine. In the case of *Goodright v. Forrester*, the able counsel for the defendant (Mr. Preston) properly observed, "that no new cause of avoiding the fine can arise after the fine. That every right of avoiding the fine must commence in the party, or his ancestor, testator, or intestate, upon a cause existing before the fine is levied; so that no alienation or disposition can be made which can introduce strangers into the situation of claiming a new title, or cause of entry, action, &c." From this it follows, that if a person with a reversion in fee which has been devised, devises such reversion (supposing he can devise it, though, it is conceived, he can not, see *Goodright v. Forrester*, 1 Taunt. 578.) to one for life, with remainders over, the devisee for life must make his entry or claim within the very same period within which the testator himself must have made it had he been living; and if such devisee for life neglects to assert his right within the proper time, not only will he be barred himself, but the devisees in remainder will also be barred; for such devisee for life, and the devisees in remainder, only standing in the place of the testator, and having, altogether, only the same interest which he (the testator) had they only amongst them such right to avoid the fine as the testator himself would have had in case he had been living. This doctrine, however, though agreeable, probably, to the true construction of the act 4 Hen. 7. chap. 24. is certainly a harsh one, as the devisee in remainder (supposing the devise to be good) may lose his right from the laches or neglect of the devisee for life, as was actually the case in *Goodright v. Forrester*; though, if the court had not decided against him on that ground, it probably would on the ground of the devisor not having a devisable interest. But though the rule, it is conceived, could not apply in the case of a devise by a remainder-man in fee, where the remainder is devised prior to the devisor's death; yet it would be applicable, it is presumed, in case the devisor died before the fine was levied, and also in the case of a conveyance *inter vivos*, where a conveyance is made previous to the levying of the fine. The hardship, therefore, which might result from such a doctrine ought to be remedied by some legislative measure.

sons are barred by the fines that are levied by others if they make not their claim in time, as if one disseise a corporation aggregate of land belonging to their corporation, and after levies a fine of it with proclamations, and they do not make their claim, &c. within five years, hereby they are barred (t). 2. Where the ancestor is barred by the fine, there for the most part the heir is barred also. And therefore if tenant in tail be disseised, and the disseisor levies a fine with proclamations, and the tenant in tail suffer five years to pass without claim, &c. hereby he and his issues are barred for ever, so that the heir doth suffer for the laches of his ancestor. 3. The estates that shall be barred by the fine are estates by the common law, or by copyhold, in fee-simple, fee-tail, or for life, or for years, the estate also of tenant by statute, elegit (u), and of guardians in chivalry, and of executors that have land until debts and legacies be paid (w). And therefore if one enter upon, and put out a copyholder of land, and levies a fine thereof, and the copyholder suffer five years to pass and make no claim, &c. the copyholder and his lord both are hereby barred for ever. And if a lease be made for years, and the lessor, or another, before entry of the lessee, levies a fine with proclamations, and the lessee doth not make his claim, &c. within five * years, hereby the lessee is barred of his interest for ever (x). 4. The things whereunto

Co. 9. 105.

Co. 9. 104, 5.
124.

* P. 23.

(t) See further on the subject of corporations being barred by fine and non-claim, page 14, note (x).

(u) Provided the lands are extended, but not otherwise. See *Deighton v. Gruncille*, 2 Ventr. 333.

(w) Also a title of entry for condition broken—a power appendant or in gross (but not simply collateral)—a power of revocation—and a writ of error, may respectively be barred by a fine and non-claim. See *Hulne v. Heylock*, Cro. Car. 200. *Mayor of London v. Alford*, Cro. Car. 575. 1 Wm. Jones, 452. *Cromwell's case*, 2 Rep. 69. *Thomason v. Mackworth*, Carter, 75. So devisees may be barred by a fine with proclamations and non-claim, as may persons claiming under executory devises, shifting and springing uses, &c.; but such interests cannot be destroyed by a fine without proclamations, as a contingent remainder may where there are no trustees to support it. But for further information on these subjects, the student should consult Mr. *Fearn's Treatise on Contingent Remainders and Executory Devises*, and Mr. *Syden's Treatise on Powers*. A fine with the plea of long possession under it, is no answer to a bill in equity brought for the discovery of the deed declaring the uses of such fine. *Holt v. Lowe*, 4 Bro. 253.

(x) The time from which the period of non-claim is to be computed in the case of a lease for years, is from the time the term commences in possession. *Saffer's case*, 5 Rep. 123. Cro. Jac. 60. Whilst it remains a mere *interesse termini* the fine does not run. And if the lessee should die intestate before the term took effect in possession, the period of non-claim would commence, not from the lessor's death, or from the time of the term commencing in possession, but from the time of administration being obtained to his personal estate. *Stanford's case*, cited Cro. Jac. 61. And if a term of years is made to commence in *presenti*, but there is a prior term which prevents the lessee of the latter term from having immediate possession, in this case the period of non-claim would commence, it is conceived, from the determination of the prior term; and it is upon this ground only that the decision in the case of *Goodright v. Bond* is to be supported.

A term of years vested in a trustee for any particular purpose will be barred by fine and non-claim, (*Hammer v. Eytton*, Comb. 67. 1 Cha. Cas. 27. 33.) except in the case of a term which has been expressly assigned to attend the inheritance. 1 Leo. 272. 1 Ventr. 82. Sid. 460. 3 Cha. Cas. 1. 3 Keb. 564. But although a term of years, vested in a trustee for a particular purpose, may be barred at law by a fine and non-claim, yet if the party entitled to the trusts of the term laboured under any disability, there would be no bar in equity, at least not 'till the lapse of five years from the time the disability was removed; and the same would be the case with respect to any other equitable interest, for a *cestui que trust* never suffers in equity from the laches or neglect of his trustee. *Allen v. Sugar*, 2 Vern. 368. Though it is said, that a fine by the owner of the inheritance will not, generally speaking, destroy a term which has been assigned to attend; yet it has been held, that where a purchaser of the inheritance had no notice of a term the existence of which might prejudice his title, that there a fine would destroy such term. See 2 Ventr. 329. If, however, the reason which is assigned

Plow. 378.
Bro. Fines,
123. Co. 5.
124.

whereunto these statutes do extend; are lands and tenements, and not a rent or other profit appender out of the land, and therefore if I have a rent, common, or estovers out of land or a way over land, or power to sell the land, and a fine is levied of the land itself; and I do not make my claim of my rent, &c. within five years, yet I am not hereby barred of my rent, &c. (g). And for this cause it is, that if a tenant in ancient demesne levies a fine of his land, and five years pass, the lord is not hereby barred to avoid it, for herein he claimeth not the land but his ancient seignory (z). 5. The time in which they must make their claim, or bring their action that have present right and no impediment is within five years after proclamation had (a),

Plow. Lord
Zouche's case,
370.

assigned why a fine and non-claim will not bar a term which has been assigned to attend, where a purchaser of the inheritance knows of the term, viz. because the owner of the inheritance is considered as tenant at sufferance to the trustee of the term, if this reason can be considered a sound one, then on principle, no term which is attendant upon the inheritance, can be barred by a fine levied by the owner of the inheritance; for whether such term is attendant upon the inheritance by express declaration, or by construction of equity, or whether the owner of the inheritance has any knowledge of it or not, he must be considered in one case as much as in the other, as tenant at sufferance to the trustee of the term. But how, it may be asked, can he be considered AT LAW, which takes no notice of trusts, as tenant to his trustees? As well, it is conceived, might a court of law consider a disseisor as tenant to the trustee of the term, or, as well might the owner of the inheritance be considered as tenant to the owner of a beneficial term. Every term of years in the legal estate is at law a beneficial term. At law nothing is known of any trust. In considering, therefore, the operation of a fine upon a term of years, the trust of the term must be put completely out of sight. In fact, if no better reason can be assigned for the doctrine, that a fine with non-claim by the owner of the inheritance will not bar an attendant term, than that the owner of the inheritance is tenant at sufferance to the trustee of the term, (and it is apprehended that no better can be assigned,) in that case the doctrine must be considered as resting upon a very weak foundation. The owner of the inheritance, and the trustee of the term, are to be considered at law as having no more connexion with each other, than the owner of the inheritance and the owner of a beneficial term have with one another; and as to the owner of a beneficial term, there can be no doubt but he may be barred by a fine, with non-claim, levied by the owner of the inheritance. On principle, therefore, a fine, with non-claim, by the owner of the inheritance, must destroy an attendant term; and that whether the owner of the inheritance knows of it or not. The editor is aware that this opinion, if correct, must affect the efficacy of terms as a protection to the inheritance, but this has nothing to do with a point which must be considered upon principle. Attendant terms, however, may be protected, it is conceived, against the operation of a fine levied by the owner of the inheritance, by declaring that the fine shall cure to corroborate and support the terms.—An act of parliament (so framed as to preserve the operation of fines in other respects) might declare that fines by the owner of the inheritance should not affect attendant terms.

(y) See *infra*, page 35, latter end of note (i).

(z) It is said, that if a second fine is levied, with proclamations in the Common Pleas, of lands held in ancient demesne, that the lord, if free from disability, will be barred of his writ of deceit if he neglects to pursue his right of reversing the fines within five years after the latter fine is levied. *Wright's case*, Owen, 21. 2 Inst. 518. Plowd. 370.

If a fine, levied in the Court of Common Pleas, of lands held in ancient demesne, is reversed by the lord, it seems to be doubtful whether it remains good as between the parties. If the lands are not within the jurisdiction of the court, in that case, it is conceived, the fine can have no operation, even as between the parties; for it appears to be well understood, that a fine levied in a court which has no jurisdiction is absolutely void. On the other hand, if lands in ancient demesne are within the jurisdiction of the Court of Common Pleas, then there can be no reason, probably, why the fine should not be good as between the parties though reversed as to the lord; for the lord only seeking to restore his own right, why should not the fine remain good as to all others? The question, therefore, as to the fine being good or not, would seem to depend upon the lands being, or not being, within the jurisdiction of the Court of Common Pleas.—Supposing them to be so, would, it may be said, a fine with proclamations, levied in the Common Pleas, bar an estate tail, or gain or confirm a title by non-claim? As it is by no means clear that it would, and as we have seen, that a fine in the court of ancient demesne will not bar an estate tail, it follows, that a recovery ought always to be allowed to destroy an entail in lands held in ancient demesne.

(a) The time of making the last proclamation, is the time from which the period of non-claim begins to run.

and the time for them which have impediments is within five years after the impediment removed. 6. The time within which they must make their claim or bring their action whose right doth happen afterwards, if they have no impediment, is within five years after the time that their right doth accrue, and if there be an impediment within five years after the impediment removed. 7. The persons whose right is saved and preserved are mentioned in the first and second saving of the statute of 4 H. 7. and they are strangers (a), and not parties nor privies. 8. They that have benefit by the first saving of the statute shall have none by the second saving, for he that will be within the second saving to have benefit by it must be, ¹. Another person. ². The right must come and accrue to him first. ³. It must come to him after the fine and proclamations.

Dyer, 3 Co. 3.
86. 91. Plow.
373.

(a) Strangers who have distinct rights, accruing at different times, have a period of five years allowed to avoid a fine after each distinct right accrues. As if A. was tenant for life with remainder to B. for life, with remainder to A. in tail or in fee; though A. should neglect to avoid a fine and by that means should lose his estate for life, yet after the death of B. when his (A.'s) remainder in tail or fee came into possession he would have another period of five years in which to avoid it. And where a tenant for life levies a fine, the remainder-man has two periods within which to make his entry or claim; viz. one period of five years after the levying the fine, when a right accrues to him by forfeiture, and another after the death of the tenant for life, when the remainder comes into possession. See *Lamnd v. Tucker*, Cro. Eliz. 354.

If a lessee is ousted and the person in reversion disseised, and the disseisor levies a fine, the lessee, if free from disability, will be barred if he does not make his claim within five years; but the reversioner, if the lease is a valid one and binding upon him, (but not otherwise, see *Salvia v. Clarke*, Cro. Car. 156. W. Jones, 211.), has two periods within which to avoid the fine, the one within five years after the fine is levied, and the other within five years after the expiration of the term; and the contrary doctrine, (9 Rep. 105 b.) is not considered as law: So if a lessee for years makes a feoffment and levies a fine, the lessor has two periods of five years in which to avoid it, one after the fine is levied and the other after the expiration of the term. See *Whalley v. Tunsard*, 1 Ventr. 241. T. Raym. 219.

It will be proper to observe, that when a fine is avoided by a person who has a partial interest in the estate, it is said to be avoided, not only as to himself, but also as to all those who claim ulterior interests. This however is to be understood with the exception of a fine with proclamations levied by tenant in tail, which, although it may be avoided by a person claiming some particular interest in the lands, will still be good as against the issue in tail. 1 And. 43. 3 Rep. 91. And it is also to be understood with the exception of a fine avoided (as to his own estate) by the entry of a tenant for years, where such fine was levied by tenant in tail in possession; which, notwithstanding such entry of the tenant for years, can only be avoided as to the estates of those in remainder or reversion, by a real action. Litt. a. 411. Co. Litt. 304. The doctrine, however, that the avoidance of a fine by a person having a particular estate, is an avoidance of it as to persons in remainder, is not easily reconcilable, it is conceived, with the true construction of the statute of non-claim. 4 Hen. 7. c. 24. By this act strangers with a present right of possession at the time of levying the fine, are to pursue their rights within five years after the fine levied and proclamations made; and strangers, with rights which come to them (come to them in possession) after levying the fine by virtue of any gift, &c. before the fine was levied, are to pursue their rights within five years after such rights accrue or come into possession; with certain savings in the case of disabilities. Suppose an estate to be limited to A. for life, with remainder to B. for life, with remainder to C. in tail, with remainders over. A. is disseised, and the disseisor levies a fine come cee with proclamations; A. reverts his estate, but upon his death the disseisor enters again, and B., though under no disability, neglects for five years to make any entry or claim. Can it be contended, on any sound construction of the statute of non-claim, that B. is not barred by the fine and non-claim; but that, in consequence of A. having pursued his right according to the statute, B. is under no obligation to pursue his right at all? The statute, it may be observed, does not say that one person pursuing his right shall be equivalent to another person pursuing his; or that if one person pursues his right the fine shall be void as to all others; but, on the contrary, it distinctly requires, that each person should pursue his own right within a certain time after such right accrues: it will be observed he is to pursue it after it accrues (that is, after it accrues in possession), and that if he does not he shall be barred. A. having pursued his right before the right of B. accrued can never be considered as B. pursuing his right after it accrued. In short, each person must pursue his own right within a certain time after it accrues, and that without any regard to what may have been done by those with antecedent rights. On this ground the decision in the case of *Carhampton v. Carhampton*, 1 Irish T. R. 567. is not, it is conceived, agreeable to the true construction of the statute of non-claim.

Co. 5. 124. 9.
106.

4. His right must be upon some cause or matter before the fine. 9. No fine shall bar any estate in possession, reversion, or remainder, which is not divested and put to a right at the time of the fine levied (b). And therefore if one levies a fine of my land whilst I am in possession of it, this fine will not hurt me. So if the tenant of the land, out of which I have a rent or common, &c. levies a fine of the land, this shall not bar me of my rent or common, for I am still in possession of this in the judgment of the law (c). So if there be tenant for life, the remainder for life; or tenant in tail, the remainder in tail; and the first tenant in tail, or for life, do bargain and sell the land by deed indented and inrolled, and after levies a fine to the bargainee, in this case the remainders are not barred, albeit five years pass without claim, for the law in these cases doth adjudge them always in possession (d). So if I make a lease for years of land, rendering a rent, and a stranger levies a fine of the land, and the lessee for years payeth his rent to me duly, in this case I am said to be always in possession, and therefore am not barred by this fine of my reversion. So if there be a tenant by copy or lease for life, the remainder for life, and the first tenant for life accept of a fine of the * land with proclamations, and five years pass without claim, &c. hereby he that is in remainder is not barred. So if one have a lease for years of land to begin in future, and a fine is levied of the land, and five years pass after the term begins, it seems this is no bar, because this estate is not put to a right (e). And for the further illustration of all these things see the examples following. * If tenant in tail levy a fine of the land intailed with proclamations according to the statutes, this is a bar to the estate tail, wherein these things are to be known. 1. That wheresoever the issue doth claim by the same title, and must make his conveyance to the lands by him that levied the fine, there the fine will bar him, and therefore if lands be given to the husband and wife in special tail, viz. to them and to the heirs of their two bodies issuing, or the like; or the gift be to them and the heirs males or females of their two bodies; or to them and the heirs of their bodies, with the remainder to the right heirs of the husband in fee; and the husband alone levie a fine with proclamations, by this the issue in tail is barred. And yet the right of the wife is saved so as she makes her claim, &c. within five years after her husband's death (f).
So

* P. 24

1. Issue in tail barred by the fine of his ancestor or some other.

* Stat. 4 H. 7.
32 H. 8. Co.
super Lit. 372.

1) Co. 9. 138.
140. Dyer, 3.

(b) As to the doctrine relative to divesting estates, see *infra*, p. 35, latter part of n. (i).

(c) See *infra*, p. 35, latter part of n. (i).

(d) But if in the bargain and sale or in a lease and release, the tenant in tail (if he is tenant in tail in possession) covenants to levy a fine and levies it accordingly, the deed and fine are held to be but one conveyance or assurance, and to operate so as to work a discontinuance and divest the remainder. See *Doe on Dem. Odierne v. Whithead*, 2 Burr. 704.

(e) This is to be understood of a fine by one who has no estate of freehold: a fine with proclamations, levied by a person who has an estate of freehold, either by right or by wrong and five years non-claim would be a bar after the term commenced in possession, provided the lessee was free from disabilities.

(f) This doctrine, it is conceived, is very doubtful. The statute of the 32 H. 8. c. 36, says, that fines levied by any person or persons, of estates entailed to the person or persons levying them, or to any of their ancestors, shall bar the entail. Where the husband and wife are jointly seized of the estate in tail, the estate cannot be said to be entailed to him; it is entailed to him and another; and therefore

sons are barred by the fines that are levied by others if they make not their claim in time, as if one disseise a corporation aggregate of land belonging to their corporation, and after levies a fine of it with proclamations, and they do not make their claim, &c. within five years, hereby they are barred (t). 2. Where the ancestor is barred by the fine, there for the most part the heir is barred also. And therefore if tenant in tail be disseised, and the disseisor levies a fine with proclamations, and the tenant in tail suffer five years to pass without claim, &c. hereby he and his issues are barred for ever, so that the heir doth suffer for the laches of his ancestor. 3. The estates that shall be barred by the fine are estates by the common law, or by copyhold, in fee-simple, fee-tail, or for life, or for years, the estate also of tenant by statute, elegit (u), and of guardians in chivalry, and of executors that have land until debts and legacies be paid (w). And therefore if one enter upon, and put out a copyholder of land, and levies a fine thereof, and the copyholder suffer five years to pass and make no claim, &c. the copyholder and his lord both are hereby barred for ever. And if a lease be made for years, and the lessor, or another, before entry of the lessee, levies a fine with proclamations, and the lessee doth not make his claim, &c. within five * years, hereby the lessee is barred of his interest for ever (x). 4. The things whereunto

Co. 9. 105.

Co. 9. 104, 5. 124.

* P. 23.

(t) See further on the subject of corporations being barred by fine and non-claim, page 14, note (x).

(u) Provided the lands are extended, but not otherwise. See *Deighton v. Gruncille*, 2 Ventr. 333.

(w) Also a title of entry for condition broken—a power appendant or in gross (but not simply collateral)—a power of revocation—and a writ of error, may respectively be barred by a fine and non-claim. See *Hulne v. Haylock*, Cro. Car. 200. *Mayor of London v. Alford*, Cro. Car. 373. 1 Wm. Jones, 452. *Cromwell's case*, 2 Rep. 69. *Thomason v. Mackworth*, Carter, 75. So devisees may be barred by a fine with proclamations and non-claim, as may persons claiming under executory devises, shifting and springing uses, &c.; but such interests cannot be destroyed by a fine without proclamations, as a contingent remainder may where there are no trustees to support it. But for further information on these subjects, the student should consult Mr. *Fearn's Treatise on Contingent Remainders and Executory Devises*, and Mr. *Sugden's Treatise on Powers*. A fine with the plea of long possession under it, is no answer to a bill in equity brought for the discovery of the deed declaring the uses of such fine. *Holt v. Lowe*, 4 Bro. 253.

(x) The time from which the period of non-claim is to be computed in the case of a lessee for years, is from the time the term commences in possession. *Saffer's case*, 5 Rep. 123. Cro. Jac. 60. While it remains a mere *interesse termini* the fine does not run. And if the lessee should die intestate before the term took effect in possession, the period of non-claim would commence, not from the lessee's death, or from the time of the term commencing in possession, but from the time of administration being obtained to his personal estate. *Stanford's case*, cited Cro. Jac. 61. And if term of years is made to commence in *presenti*, but there is a prior term which prevents the lease of the latter term from having immediate possession, in this case the period of non-claim would commence, it is conceived, from the determination of the prior term; and it is upon this ground that the decision in the case of *Goodright v. Bond* is to be supported.

A term of years vested in a trustee for any particular purpose will be barred by fine and non-claim (*Haxner v. Eytton*, Comb. 67. 1 Cha. Cas. 27. 33.) except in the case of a term which has been expressly assigned to attend the inheritance. 1 Leo. 272. 1 Ventr. 82. Sid. 460. 3 Cha. Cas. 1. 3 Keb. 58. But although a term of years, vested in a trustee for a particular purpose, may be barred at law by fine and non-claim, yet if the party entitled to the trusts of the term laboured under any disability there would be no bar in equity, at least not 'till the lapse of five years from the time the disability was removed; and the same would be the case with respect to any other equitable interest, *scilicet* *que* trust never suffers in equity from the laches or neglect of his trustee. *Allan v. St. 2 Vern. 368*. Though it is said, that a fine by the owner of the inheritance will not, generally speaking, destroy a term which has been assigned to attend; yet it has been held, that where the purchaser of the inheritance had no notice of a term the existence of which might prejudice his title, that there a fine would destroy such term. See 2 Ventr. 329. If, however, the reason which

assigns

Plow. 378.
Bra. Fines,
124. Co. 5.
124.

whereunto these statutes do extend; are lands and tenements, and not a rent or other profit appender out of the land, and therefore if I have a rent, common, or estovers out of land or a way over land, or power to sell the land, and a fine is levied of the land itself; and I do not make my claim of my rent, &c. within five years, yet I am not hereby barred of my rent, &c. (y). And for this cause it is, that if a tenant in ancient demesne levies a fine of his land, and five years pass, the lord is not hereby barred to avoid it, for herein he claimeth not the land but his ancient seignory (z). 5. The time in which they must make their claim, or bring their action that have present right and no impediment is within five years after proclamation had (a),

Plow. Lord
Zouch's case,
370.

assigned why a fine and non-claim will not bar a term which has been assigned to attend, where a purchaser of the inheritance knows of the term, viz. because the owner of the inheritance is considered as tenant at sufferance to the trustee of the term, if this reason can be considered a sound one, then on principle, no term which is attendant upon the inheritance, can be barred by a fine levied by the owner of the inheritance; for whether such term is attendant upon the inheritance by express declaration, or by construction of equity, or whether the owner of the inheritance has any knowledge of it or not, he must be considered in one case as much as in the other, as tenant at sufferance to the trustee of the term. But how, it may be asked, can he be considered AT LAW, which takes no notice of trusts, as tenant to his trustees? As well, it is conceived, might a court of law consider a disseisor as tenant to the trustee of the term, or, as well might the owner of the inheritance be considered as tenant to the owner of a beneficial term. Every term of years in the legal estate is at law a beneficial term. At law nothing is known of any trust. In considering, therefore, the operation of a fine upon a term of years, the trust of the term must be put completely out of sight. In fact, if no better reason can be assigned for the doctrine, that a fine with non-claim by the owner of the inheritance will not bar an attendant term, than that the owner of the inheritance is tenant at sufferance to the trustee of the term, (and it is apprehended that no better can be assigned,) in that case the doctrine must be considered as resting upon a very weak foundation. The owner of the inheritance, and the trustee of the term, are to be considered at law as having no more connexion with each other, than the owner of the inheritance and the owner of a beneficial term have with one another; and as to the owner of a beneficial term, there can be no doubt but he may be barred by a fine, with non-claim, levied by the owner of the inheritance. On principle, therefore, a fine, with non-claim, by the owner of the inheritance, must destroy an attendant term; and that whether the owner of the inheritance knows of it or not. The editor is aware that this opinion, if correct, must affect the efficacy of terms as a protection to the inheritance, but this has nothing to do with a point which must be considered upon principle. Attendant terms, however, may be protected, it is conceived, against the operation of a fine levied by the owner of the inheritance, by declaring that the fine shall serve to corroborate and support the terms.—An act of parliament (so framed as to preserve the operation of fines in other respects) might declare that fines by the owner of the inheritance should not affect attendant terms.

(y) See infra, page 35, latter end of note (i).

(z) It is said, that if a second fine is levied, with proclamations in the Common Pleas, of lands held in ancient demesne, that the lord, if free from disability, will be barred of his writ of deceit if he neglects to pursue his right of reversing the fines within five years after the latter fine is levied. Wright's case, Owen, 21. 2 Inst. 518. Plowd. 370.

If a fine, levied in the Court of Common Pleas, of lands held in ancient demesne, is reversed by the lord, it seems to be doubtful whether it remains good as between the parties. If the lands are not within the jurisdiction of the court, in that case, it is conceived, the fine can have no operation, even between the parties; for it appears to be well understood, that a fine levied in a court which has no jurisdiction is absolutely void. On the other hand, if lands in ancient demesne are within the jurisdiction of the Court of Common Pleas, then there can be no reason, probably, why the fine should not be good as between the parties though reversed as to the lord; for the lord only seeking to restore his own right, why should not the fine remain good as to all others? The question, therefore, as to the fine being good or not, would seem to depend upon the lands being, or not being, within the jurisdiction of the Court of Common Pleas.—Supposing them to be so, would, it may be said, a fine with proclamations, levied in the Common Pleas, bar an estate tail, or gain or confirm the same by non-claim? As it is by no means clear that it would, and as we have seen, that a fine in a court of ancient demesne will not bar an estate tail, it follows, that a recovery ought always to be allowed to destroy an entail in lands held in ancient demesne.

(a) The time of making the last proclamation, is the time from which the period of non-claim begins to run.

" Co. 3. 50,
51. 9. 140.

" Plow. 434,
435.

" Curia. 21 Jac.
Co. B.

" Idem.

his wife in special tail, and the grandfather dieth, and the father doth disseise the grandmother, and doth levy a fine with proclamations, the grandmother dieth, and then the father dieth, in this case the son is barred (k). " So if lands be conveyed in tail to a woman for her jointure within the statute of 11 H. 7. cap. 20. and whilst she liveth the issue in tail doth levy a fine of the land, by this the issues inheritable to the estate tail are barred for ever. " So if tenant in tail make a feoffment or be disseised, and after levy a fine with proclamations to a stranger, hereby his issues are barred for ever (l). " So if tenant in tail die, and his issue before his entry (having a freehold in law only) doth levy a fine with proclamations; this shall be a bar to his issues and to his collateral heirs and brothers of the half blood. " So if a tenant in tail have four daughters

the ancestor and the estate actually descends upon him, the fine will bar, not only the consor's own issue in tail, but also his collateral heirs in tail. And it will have the same effect although he dies in his ancestor's life-time, provided he leaves issue upon whom the right of entail devolves. But if he dies in his ancestor's life-time without issue, then the collateral heirs in tail will not be affected by the fine. It may be thought, however, that the distinction taken between the case, where the consor dies in his ancestor's life-time *leaving issue*, and where he dies in his ancestor's life-time *without issue* (holding the fine in the former case to be a complete bar of the estate tail, and in the latter to be completely inoperative), is unwarranted by the act of the 32 H. 8. c. 36. If this act enables a person who has the mere possibility of an estate-tail to levy a fine at all, it may be contended that it enables him to do so in as ample and comprehensive a manner as it enables a tenant in tail in possession to levy one; for the act invests both with the power, (supposing both to have the power) by the very same words; and consequently a fine levied by the one must be as extensive in its operation, as when levied by the other. Now, as a fine levied by a tenant in tail in possession, in all cases bars his *collateral* heirs in tail as well as his own issue, so I apprehend a fine levied by a person with the mere possibility of an estate tail (supposing he can levy a fine at all), must likewise, in *all cases*, bar his collateral heirs as well as his own issue. The act expressly says, that a fine levied by a tenant in tail *shall be a bar to the estate tail*. It is therefore clear, that wherever a fine is levied by a person *whom the act enables to levy one*, that it must operate as a *complete bar*. With respect, however, to a person who has the mere possibility of an estate tail, there seems to be much reason to think, that he is *not* a person whom the act enables to levy a fine. The courts, in holding that he is, appear to have misconstrued the act. They held, that it was by force of the words, "*entailed to any of his ancestors*," that a person with the mere possibility of an estate tail might levy a fine; and they appear to have thought, that unless they put this construction upon the words they could have no meaning. It is apprehended, however, that they may bear another construction. Perhaps it may not admit of much doubt, but that the true meaning of the words, *entailed to the person levying the fine or ANY OF HIS ANCESTORS*, is, that the fine should be a bar, whether the entail had its inception or commencement in the consor himself, or in any of his ancestors.

This construction is, perhaps, not only the more natural, but it is certainly more agreeable to the policy of the common law, which does not allow possibilities and expectancies to be in anywise dealt in; and the acts relating to fines afford no reason to suppose, that the legislature intended to make any alteration in the common law, with respect to possibilities in estates tail. They considered it enough, it is apprehended, to put estates tail in the power of the present, or immediate tenant in tail, (whether it was an estate tail in possession or remainder), and never thought of subjecting them to destruction by a person who at some future period might by possibility become so. By such a construction as is contended for, the courts would never have fallen into such an absurdity, (and to avoid an act of manifest injustice they have been obliged to fall into it), as to hold, that a fine levied by a person with the possibility of an estate tail, *shall destroy the estate tail or not do so*, according to an event (*viz.* whether the consor dies with or without issue in his ancestor's life-time), which may not be ascertained till years after the fine is levied, and which consequently, in the meantime, leaves the fine without any operation; and whether it will ever have any operation or not, is, at the time of levying it impossible to say. Where the act says, that the fine *shall be a bar*, the legislature, it is conceived, did not intend that it should depend upon future events, whether it should or should not be so. Upon the whole there appears strong reason to think, that the statute does not enable a person with the mere possibility of an estate tail to levy a fine at all; and that the cases which have held that it does, are not to be relied on.

(k) If the opinion advanced in the last note, *viz.* that a person with the mere possibility of an estate tail has no power to levy a fine, is well founded, in that case the son is *not* barred, unless he should be barred by reason of non-claim; just as he might have been, if the disseisor had been an entire stranger to the estate tail.

(l) And the fine, it is said, enures to the use of the feoffor or disseisor. But see page 14, latter part of note (t).

and one of them levy a fine in the life of the father, this will be a bar to her issue for the fourth part of the land (m).

* Co. 3, 50, 51.
9. 140.

But in these cases before and such like, where the issue in tail doth levy a fine in the life-time of the tenant in tail, the tenant in tail himself may after levy a fine of the land, and thereby bar his issue, and the donee also to whom his issue hath levied a fine, and therefore in all these cases it is supposed that the tenant in tail doth die and suffer the right to descend to his issue. * If lands be given by will

* Co. 10. 50. 9.
141. 3. 50, 51.

to one when he shall come to his age of twenty-four years, to hold to him and the heirs of his body, and he after his age of twenty-one years levy a fine of this land with proclamations, this is a bar to the issue in tail (n). If a disfeisor make a gift in tail, and the donee make a feoffment to A. and after levy a fine with proclamations to B. that hath nothing in the land, this fine will bar the issues in tail; and they shall not avoid it by pleading that *partes finis nihil habuerunt*, &c. But it is no bar to the disfeisor, for he may avoid it by this plea when he will. * And *a fortiori* therefore, if a fine be levied by the tenant in tail that hath only an estate of freehold in remainder or reversion, it is good; as if A. be tenant for life, the remainder to B. in tail, and B. levy a fine, albeit this be no discontinuance, yet it is a bar to the estate tail. * But if tenant

* Co. 3. 84.

* Trin. 25 Jac.
Co. B. Will.
Godfrey versus
Wade's.

in tail have issue a son and a daughter, and the son, living the tenant in tail, levy a fine and die without * issue, and then the tenant in tail dieth, by this the daughter and the estate tail is not barred. So if the younger son levy a fine in the life of the father, and then the tenant in tail die, this is no bar to the elder son. So if lands be given to a man and the heirs females of his body, and he hath a son and a daughter, and the son doth levy a fine of the land, this is no bar to the daughter. So if tenant in tail have a daughter, his wife being with child of a son, and the daughter levy a fine, and after the son is born, this fine shall not bar the son, for these howbeit they be privies and heirs to the blood, yet are not privies and heirs to the estate. 6. Albeit the estate, passed by the fine, be afterwards, before all the proclamations had, avoided, yet the issue in tail is barred by it. And therefore if tenant in tail discontinue in fee, and after disfeise the discontinuee and levy a fine with proclamations to a stranger, and take an estate back by render in the same fine, and the discontinuee, before all the proclamations pass, enter and claim and so avoid the fine, yet hereby the estate tail is barred. * And if tenant in tail infeoff the issue in tail, and after disfeise him and levy a fine, the issue enter, and after the proclamations pass, and after the issue in tail doth infeoff the tenant in tail which levied the fine, and dieth, it seems this fine shall bar the issues in tail. 7. This is a bar to the estate tail and to the issues only, and is no bar to him in remainder or reversion; and

Discontinuance.

* P. 37.

6] Co. 3. 91.

* Per Popham
at Fenner,
Just. M. 39,
de Eliz. B. R.

7] Co. 1. 76.
super Lit. 372.

(m) See the last note but one.

(n) The devise in such a case must be considered to have a present vested estate tail, only the time of enjoyment is postponed. (See *Wheeldon v. Lea*, 3 T. R. 41. *Doe v. Nowell*, 1 Maule & Selw. 337. *Goodright v. Parker*, *ibid.* 692, and cases there cited). A fine, therefore, by such a person, is essentially different from a fine by a person with the mere possibility of an estate tail, which, it is conceived, will not bar the estate tail. See *supra*, page 26, note (i).

therefore

therefore when the estate tail is spent, this bar is at an end. And therefore, if an estate be limited to A. and B. his wife and the heirs males of the body of A. the remainder to C. and A. and B. have issue and A. die, and B. and her issue, or her issue alone levy a fine, this will bar the issues of the issues whilst there be any, but if they fail it will not bar C. in remainder, except he suffer five years to pass, and so be barred by his non-claim. So if tenant for life and he that is next in the remainder in tail, join in a fine, this is a good bar to the issues in tail for ever as long as that estate tail shall continue, but not to him that is next in remainder, nor to any other that shall come in of any remainder in tail or in fee, nor to him in reversion.

* If lands be given to A. and the heirs males of his body, the remainder to B. and the heirs males of his body, the remainder to the right heirs of A. and A. doth bargain and sell this land by deed indented and enrolled to I. S. and his heirs, and after levy a fine of it *sur conuissance de droit come ceo*, &c. to him and his heirs, by this the remainder to B. is not discontinued, but it is a bar to the estate tail by the statutes, and causeth the estate of the bargainee to last so long as the tenant in tail hath issues of his body; but if the fine had been before the bargain and sale it had been a discontinuance of the remainder (o), but in neither case a bar to him in remainder, unless * he suffer himself to be barred by his non-claim within five years after his remainder happen to come in possession. 8. If there be tenant in tail, the remainder to him in tail, and the tenant in tail levies a fine of this land, hereby both his estates are barred (p). *Et sic de similibus*. 7 But all this notwithstanding, if lands be conveyed to a woman in tail for her jointure within the statute of 11 H. 7. chap. 20. and she levies a fine of this land, this will not bar the issues in tail (q). Or if lands be given

* Co. 10. 96.
& 9 Jac. B. R.

8] Co. super
Lit. 372.

7 Bro. Fines,
121. Co. 6. 35.
Dier, 4. Co.
super Lit. 372.
Co. 8. 17. 78.
in

Discontinu-
ance.

* P. 28.

(o) But otherwise, if the deed contained a covenant to levy the fine. See page 33, note (h).

(p) As if lands were limited to an eldest son in tail, with remainder to his father in tail, a fine with proclamations, by the son, levied after his father's death, would bar the father's younger children. See 1 Inst. 372.

(q) It may be proper to consider what cases are within the protection of this act, as in those cases no fine can be levied either by the wife alone or with an after-taken husband. A settlement, where made by the husband's brother, has been held to be within it (*Sharlington v. Stretton*, Plowd. 300); but where made by a mere stranger it is clearly not within it. *Ward v. Walkew*, Cro. Jac. 173. Yelv. 101.

To bring a settlement within the protection of the act, it is not necessary that it should proceed from the spontaneous bounty of the husband or his relations, or that the marriage should be the sole consideration moving it; for if it is expressed to be made in consideration of the wife's fortune, yet, if it was made in consideration of the marriage, as well as of the fortune, it will be protected by the act. *Villiers v. Beaumont*, 2 Dyer, 186. *Kirkman v. Thompson*, Cro. Jac. 474.

If a man and woman who are joint-tenants in fee happen to intermarry and settle the whole estate upon themselves jointly in tail, as to the husband's moiety the settlement will be within the protection of the act. *Laughter v. Humphries*, Cro. Eliz. 524. And as the spirit of the act has been looked at rather than the strict letter it has been properly held, that if the husband or his ancestors make a conveyance in fee to some third person, upon condition to re-convey to the wife in tail, that that is a case within its protection. *Sir George Brown's case*, 3 Rep. 50, and *Lynch v. Spencer*, Cro. Eliz. 513.

It has been said *arguendo*, that if the husband and wife sell lands belonging to the wife, and the husband lays out the money in the purchase of other lands and settles them upon the wife in tail, that this is a case which comes within the statute. *Sir Geo. Brown's case*, 3 Rep. 50 b. *Lynch v. Spencer*, Cro. Eliz. 513. Moore, 93. 455. 2 And. 44. And there certainly appears to be great reason for thinking that it does; for the husband, having acquired an absolute right to the money, had it in his power to make what use of it he thought fit, and therefore, it is conceived, the purchase should

in tail to any subject by the king's own gift or provision, and the tenant in tail levies a fine, this fine shall not bind the

should be considered in the same light as if the money was originally his own. If, indeed, the wife concurred in the sale, under a *previous stipulation* that the money should be laid out for her own benefit, that might alter the case, at least in equity—for equity, it is apprehended, would consider the husband as possessed of the money, not in his own right, but as a trustee for his wife; and would look upon him as having made the purchase in that character; and consequently would hold that the case was not affected by the act.

In the case of *Forster v. Pitfall*, Cro. Eliz. 2. it appears to have been held, that *except the settler or his heirs are prejudiced by the wife's alienation* the case is not within the act;—a doctrine, it is conceived, evidently ill-founded; for there can be no doubt that the object of the act was to prevent the wife from defeating any of the limitations of the settlement. This must be obvious, from the act giving a right of entry, upon the wife's alienation, to every person to whom the estate *should appertain upon the wife's decease*. The act, it will be observed, does not confine the right of entry to the issue of the husband and wife, or to the settler and his heirs; but gives it to such person as would be entitled under the settlement supposing the wife was actually dead, without at all regarding whether such person was a stranger or not. How then can it possibly be held, that a remainder-man who is a stranger, has not a right of entry? But besides these reasons for holding that the legislature intended to prevent the wife from defeating any of the limitations, whether to strangers or not, it may be observed, that the act expressly says, that a woman seised in tail of the gift of her husband or his ancestors shall NOT ALIENATE. Upon the whole, it is clear, it is conceived, that the act extends its protection to remainder-men who are strangers; and consequently that the case of *Forster v. Pitfall* cannot be treated as an authority. And as remainder-men who are strangers are within the protection of the act, so the settler's heir at law, upon whom the reversion in fee descends, is also within it; and the case of *Hughes v. Clubb*, 1 Com. 369, in which a contrary doctrine was held, cannot be considered as law. In *Forster v. Pitfall*, the principal reason assigned for the wife's alienation being good, was, *because nothing reverted or descended to the heirs of the husband*; from which it would appear that the court clearly considered the husband's heir entitled to the protection of the act.

It is said that copyholds are not within the act; and the reason assigned is, that if the entry, which is given to the person next entitled, could be made upon the alienation of a copyhold, that the person making it would become tenant to the lord without his consent or admission, which would be repugnant to the first principles of the law of copyholds. *Harrington v. Smith*, 2 Sugd. 41. 73. Gilb. Ten. 181. But this reason appears to be ill founded; for supposing a remainder-man to be the person entitled to make the entry, he is *already admitted* by the previous admittance of the particular tenant, it being well understood that the admittance of the particular tenant is the admittance of the remainder-man. Co. Litt. 365 b. 4 Rep. 23. *Blackburn v. Graves*, 1 Mod. 102. and cases there cited in margin. And if the heir or heir in tail is the person entitled to enter, he makes his entry in the character of heir; and it is equally well known, that the heir of a copyholder may enter and take the profits without any admission. *Broune's case*, 4 Rep. 22; and *Clarke v. Pennifather*, cited 4 Rep. 24. Supposing, however, that a copyhold is not within the act, yet if the settler procures an enfranchisement, it will instantly become so; for then, the reason which is assigned why copyholds are not within it is no longer applicable.

It may perhaps be hardly necessary to state, that *equitable or trust estates*, are as much within the act as legal ones; for uses are expressly named in it; and trusts are now what uses were then. See *Clinton v. Jackson*, 2 Vern. 489; and see 1 Eq. Cas. Abr. 420.

So purchases made by the husband, or his ancestors, in favor of his wife in tail are also within it; such purchases being expressly mentioned.

The payment, however, of a sum of money by the husband to the wife's father or relations, in consideration of their making a settlement upon the wife in tail, has been held not to be a purchase within its true meaning. *Kynaston v. Lloyd*, Cro. Jac. 624. *Copland v. Pyatt*, Cro. Car. 244. and *Jones*, 254. Whether in the cases which have arisen upon this point, the money paid by the husband was equal to the value of the lands, does not clearly appear. If it was not, there certainly seems reason to say, that such a case is not within the act; especially if the money was considerably short of the value of the land. But supposing the money was a full consideration for the estate, would not the case then be within it? Would it not then, in fact, be as much a purchase by the husband or his relations, though made from the wife's relations, as if it had been made from any indifferent person?

Though in cases falling under the protection of this act, the wife cannot, by any mode whatever, either alone or in concurrence with an after-taken husband, make a valid alienation, either by fine or otherwise for more than her own life; yet she and her husband, *by whom or by whose ancestor the settlement was made, may alienate*. It was formerly held, that they could not, and Lord Coke cites a case in which it was so determined. *Harley v. West*, Co. Litt. 365 b. The authority, however, of this case has been over-ruled by that of *Kirkman v. Thompson*, Cro. Jac. 474; and see *Wheatley v. Kemp*, cited 2 Ves. 338. a case which seems to accord with the true meaning of the act much better than that noticed by Lord Coke; so that there is no doubt but that the wife and her husband together (the husband by whom or by whose ancestor the settlement was made) may alienate the estate; and after her husband's death she may dispose of it in concurrence with the issue in tail or next in remainder; for the act expressly provides, that it (the act) shall not extend to any recovery suffered by

the issues in tail nor the king (*r*), but others it will bar, for these fines are not intended within, but excepted out of the statute of 32 H. 8. but the king himself, being tenant in tail of the gift of some of his ancestors being subjects, may levy a fine of it to bar his issues in tail. And in all cases where a recovery will not bar the issues in tail, there a fine will not bar them.

9. Wife barred by the fine of her husband or some other.

Albeit the fine of the husband and the wife together of the wife's land or of the land of the husband and wife together, be a perpetual bar to her and her heirs for ever, yet if the husband alone levy a fine with proclamations of such land, and then he die, in this case she is not barred of her right, but if she do not make her claim, &c. within five years after her husband's death she is barred of her right for ever notwithstanding the statute of 32 H. 8. (*s*). * And if one seised of land in fee marry a wife, and after make a lease of this land to *A.* for life, the remainder to *B.* in fee, and *B.* levies a fine with proclamations, and the husband dies, and the wife doth not make her claim, &c. within five years after the death of her husband, hereby she is barred of her dower for ever notwithstanding the estate for life in *A.* but if the remainder of *B.* had been put to a right at the time of the fine levied she might have avoided the fine by plea, *quod partes finis nihil habuerunt*, &c. ^b And if the husband levies a fine of his own land and dies, and his widow having no impediment doth not make her claim within five years after his death, hereby she is barred of her dower for ever. ^c If a jointure be made to a woman after the coverture, and her husband and she levy a fine of it; hereby without question she is barred of her jointure in this land, but it is thought that this is no bar of her dower in the residue of the land of the husband, and especially then when the fine is *Sur conuissance de droit come ceo*, &c. (*t*).

Dier, 72.
Flow. 373.

* M. 18 Jac.
Co. B. in *Anne Twist's case*.

^b Dier, 224.
Co. 2. 93.

^c Dier, 352.

^a If

by the wife and the heirs next inheritable, or to which the remainder-man shall consent, such consent appearing on record. See 12 Ves. 97. It must not be supposed, however, that the consent of the remainder-man will be sufficient where there is issue in tail. Notwithstanding such consent, the issue in tail would clearly have a right of entry.

(*r*) This subject will be more fully considered in the Chapter on Recoveries.

(*s*) In a fine of the wife's land by husband and wife the whole estate passes from the wife, and the conusee is in by her only; and if the husband and wife reverse the fine by writ of error for nonage of the wife, the whole estate which passed by the fine shall be restored to the wife. 2 Co. 57 b. Mr. Hargrave, in a. (1), to p. 121, of his edition of Co. Litt. discusses at length the reason why a feme covert is bound by a fine, and concludes "that the common notion of a fine's binding females covert merely by reason of the *secret examination* of them by the judges is incorrect," and that the *secret examination* should only be deemed the secondary cause of this operation, the primary one being the *pendency of a real action for the freehold of the land*.

(*t*) For she has not her election of jointure or dower till her husband's death; but if the jointure be made before the coverture, and she and her husband alien the jointure lands by fine, she shall not be endowed of any other of her husband's lands. Co. Litt. 36 b. Though the law does not believe females covert who thus voluntarily alien their jointure lands, yet if the title to any jointure made before marriage proves to be had either by fraud or accident and the jointress is evicted, she shall then (by the provisions of the stat. 27 H. 8. c. 10.) have her dower *pro tanto* at the common law. 2 Bl. Com. 178. A fine by a married woman will not only bar her dower or jointure out of the land comprised in the fine, but it will also be a bar to any other estate or interest she may have in the lands; as a right to a sum of money charged upon them. *Goodrich v. Shelbott*, Prec. in Ch. 50. Courts of equity, however, will not suffer the interest of a married woman to be affected by a fine further than the parties intended she should be affected by it: therefore, if a married woman joins with her husband in mortgaging his estate, the fine will not deprive her of her jointure or dower except as against the mortgagee; and if she joins with him in mortgaging her own estate, she will not be deprived of the equity of redemption, although it should be expressly limited to the husband, unless

* Dier, 352.

4 If lands be given to a man and his wife in tail, the remainder to the right heirs of the husband; and the husband alone levies a fine of this, this will not bar the wife, except she suffer five years to pass after his death without making claim, &c. and therefore if the fine be to the use of the husband and his heirs in fee, he may dispose it as a fee-simple, and his issue hath no remedy.

Co. 9. 105. 3.
37. super Lit.
236.

* If a man disseise me of the land I have in fee-simple, or fee-tail, and after levy a fine of this land with proclamations, and I do not make my claim, &c. within five years after the proclamations had, hereby I and my heirs are barred for ever of this land (u). And if I being such a tenant in fee make a lease for years, or be the lord of any copyhold-estate, and my lessee for years, or copyholder in fee or for life, be ousted, and I thereby disseised, and the disseisor levy a fine, and neither I nor my lessee for years, or copyholder, do make any claim, &c. within the five years after the fine levied hereby we are all barred for ever. And if one disseise me of land, and after make a lease for life of it, and then levy a fine with proclamations, and I suffer five years to pass, hereby I am barred both of the reversion and of the estate for life also.

* P. 29.

3. Disseisee and the like barred by the fine of the disseisor, &c.

Flow. in
Stovel's case.

If tenant for life make a feoffment in fee, and the feoffee levy a fine with proclamations, and he in reversion or remainder do not make his claim, &c. within five years, hereby he is barred for ever (w).

Co. 3. 79.

If I pretend right or title to land, and enter upon it, and put him out that is in possession, and then I levy a fine with proclamations, with an intent to bar him, and he doth not make his claim, &c. within five years, hereby he is barred for ever, albeit he had the true right and I no right at all.

Co. 3. 79.
Dect. & St.
33. 155.

If I purchase land of H. and after perceiving my title defeasible, and that a stranger hath the right of the land, I do levy a fine to, or take a fine from another with proclamations with intent and of purpose to bar him that hath right, and he suffer five years to pass, and doth not make his claim, &c. hereby he is barred of his right for ever. And in these and such like cases, there is no relief to be had in equity. See more in Num. 11. *infra* (x).

Equity.

If

when it is clear that such was her intention. *Jens v. Jackson*, 16 Ves. 356. *Solby v. Whitfield*, Rep. Temp. Finch, 227. *Brind v. Brind*, 1 Vern. 213. *Anon. Skin*. 238.

Where a married woman has a mere naked authority uncoupled with an interest, or a power of appointment to be exercised notwithstanding coverture, or a separate estate without being restrained as to the exercise of acts of ownership over it, in these cases she may alienate the property without fine. By the custom of London and of some other cities and towns (confirmed by the act of the 13th & 36th of H. 8. c. 22.), married women may pass their estates which lie within the jurisdiction of these places by deed enrolled.

(b) The issue shall not have five years after the death of the tenant in tail (the disseisee), for the tenant had a present right to the entail. *Plowd.* 374 a. But if the tenant in tail bargains and sells the fee, and the bargainee levies a fine, though five years elapse in the life-time of the bargainor, the tenant in tail shall not be bound but shall have five years after the death of his father. *Pentaton v. Cro. Eliz.* 896.

(w) Not five years from the time of the fine levied, but from the death of the tenant for life.

(x) But a fine and non-claim are not allowed to bar an equitable charge where the purchaser had notice of the charge at the time of his purchase. See *Drapers' Company v. Yardley*, 2 Vern. 662. Where the purchaser however has no notice of such equitable charge, there, it is conceived, a fine and non-claim will be a bar even though he has not got the legal estate. It may be hardly necessary to say that

9. Where a fine shall be a bar as to one person, and not another; or as to one part of the land, and not to another.

If there be tenant in tail, the remainder in tail, and the tenant in tail bargain and sell the land by deed indented and inrolled, and after levy a fine with proclamations to the bargainee *sur consauance de droit come ceo*, &c. in this case as to the tenant in tail and his issue this is a bar, but as to all others it is no bar, albeit they never make any claim, &c. So if tenant in tail levy a fine of his intailed land, this is a bar as to him and his issues, but as to all others it is no bar at all, and therefore he in remainder or reversion in their times may enter notwithstanding (y).

Co. 10. 95. 9. 106.

Recovery.

* P. 30.

* So if lands be entailed to the husband and wife, and the heirs of their two bodies, and the husband alone levy a fine of this land, this as to the husband tenant in tail and his issues is a bar (z), but not as to the wife, for she shall be tenant in tail still, and yet it seems she may not suffer a recovery of this land afterwards (a). So if a man attainted of felony or treason levy a fine of his land, this as to the king and lord of whom the land is held is void, and is no bar to their advantage * and title of forfeiture, but as to all others it is a good bar. * So if one levy a fine of lands in ancient demesne and of other lands together, this as to the lands in ancient demesne is not good, nor any bar at all, but as to the other lands it is a good bar (b).

* Co. 9. 140. 142.

* 7 H. 4. 44. F. N. B. 98.

10. The time of claim, and within what time he that hath right to land must make his claim, &c. to prevent the bar of the fine. Parties.

By the ancient common law, he that had right, was bound to make claim, &c. within a year and a day after the fine levied and execution thereupon, or else he was barred for ever, but this bar by *non-claim* is now gone, and if such a fine without proclamations be levied at this day, he that hath right may make his claim at any time to prevent the bar, and avoid the force of the fine.

Co. super Lit. 254. 262.

Privies.

* Parties to fines, void of impediment at the time of the fine levied, are barred of the land presently, and shall have no time to avoid the same fine by entry, claim, &c. And privies in blood, and privies in representation, claiming by the same title which their ancestor that levied the same fine had, shall be barred by the same fine presently, and that whether they have any impediment or not.

Stat. 1 R. 3. ch. 7. 4 H. 7. ch. 24.

Estrangers.

1. That have

Estrangers to fines, (being all such as are neither parties nor privies,) who have right to the land whereof the fine

See the Stat. Plow. 374.

that a purchaser for a valuable consideration, without notice, *who gets the legal estate*, is in no case affected by mere equitable charges. Where a person purchases from a trustee with notice of the trust the purchaser will be converted into a trustee himself; and a fine, levied either by the vendor or purchaser, will not, in equity, affect the right of the *cestui que trust*; for equity, regarding the purchaser as a trustee, will lay hold of his conscience, and notwithstanding the fine, compel him to perform the trust. Gilb. Ch. Ca. 62; and see 1 Vern. 149; 2 Ves. 482; 2 Atk. 631; and 3 Atk. 563. It is conceived, however, that a fine, with proclamations and non-claim, levied by a person with an estate of freehold, must be a bar to all equitable estates and interests as well as to legal ones; except in the case of equitable interests, *where equity can fix upon the conscience of the party*; which it may, either where the fine is levied by the trustee himself, or by a person who purchases with notice of the trust.

(y) See p. 33, n. (p) and (q).

(z) See p. 24, n. (f).

(a) The opinion that the wife cannot suffer a recovery does not seem to be well founded. Every tenant in tail, and also every person who has turned his estate tail into a base fee, may clearly suffer a recovery, except in cases prohibited by act of parliament, as of a woman seized *ex provisione viri*, persons seized *ex provisione coronæ*, &c.

(b) With respect to the lands in ancient demesne it would probably be good as a conveyance; at least it would be so till reversed by the lord. But whether it would be of any force after the reversal is not perfectly clear. See *supra*, page 23, note (z).

Co. 9. 105.

is levied, and have no impediment natural or legal, shall have time to make their claim, &c. within five years after the fine levied and proclamations had, and no longer. And therefore if lessee for years, tenant by elegit, or by statute, or a copyholder in fee, or for life, be ousted, and he in reversion disseised, they shall have but one five years between them to make their claim, &c. and if they claim not within that time they are all barred for ever, for they have all present right and may bring their action presently (c); but otherwise it is where the tenant for life, and he in reversion be disseised; for in this case he in reversion is not barred by the first five years after the fine levied, for in that time he can have no action, therefore he shall have time to make his claim five years after the death of the tenant for life. ^a If a disseisor levies a fine with proclamations of the land whereof the disseisin was, the disseisee must make his claim within the first five years after the proclamations had, and if he happen to die within the five years, his heir shall not have five years more but so much time more, as to make up the time incurred in his father or other ancestors time, five years; and albeit he be an infant at the time of his ancestors death, yet he shall have no longer time. ^b If a tenant in tail be disseised and the disseisor levy a fine, the tenant in tail or his issues must make their claim within the next five years after the proclamations passed, otherwise they shall be barred for ever. The like it is in the lachess of him in remainder or reversion. ^c And if in these and such like cases, he that hath present right and is without impediment bring upon himself any impediment, as if being within the realm at the time when the fine is levied, he do afterwards go beyond the sea, or the like, in these cases he shall have no longer time than the first five years after the proclamations had.

present right and no impediment.

Flou. 356. 35.

19 H. 8. 7. Plou. 374. Byt, 3.

Co. 100.

* P. 31.

In the statute, Plou. 3. Dier, 3. 367.

Estrangers to fines pestered with impediments of infancy, coverture, madness, idiocy, lunacy, imprisonment, or absence out of the realm, at the time of the levying of the fine, and having then any present interest or right shall have five years time after the infirmity removed to make their claim, &c. (d). And therefore an infant regularly shall have time for five years after he come to his full age to make his claim, &c. although he be in his mother's womb at the time of the fine levied. And yet if my father's brother disseise him, and levy a fine with proclamations, and a year after the proclamations my father dieth, and after and within five years my uncle dieth; in this case I by reason of my infancy shall have only so much time to avoid the same as at the death of my father remained to come of the five years next after the proclamations, and

2. That have present right and impediment.

Infant.

If tenant for years should be ousted and the reversioner disseised, the reversioner would have years to avoid the fine after the expiration of the term. See *Whalley v. Tuncard*, 1 Vent. 219. 1 Atk. 571. And if a tenant for life is disseised, and the disseisor levies a fine with proclamations, the remainder-man or reversioner has five years after the death of the tenant to make his claim.

But where the time once begins to run, it continues to run notwithstanding the party may afterwards be under disabilities, and notwithstanding such subsequent disabilities may happen altogether independent of the party's own agency. See *Doe v. Jones*, 4 T. R. 300.

not

Non sane memorie.

Women covert.

Imprisonment.

Out of England.

* P. 32.
3. That have
divers defects.

4. That are
without impediment, having future
right upon
cause precedent.

not a new five years, because I claim by the same title that my father had. So if my father or other ancestor be disseised, and the disseisor levy a fine with proclamations, and my father or ancestor die within five years after the proclamations; in this case I shall not have a new five years, but only so much as remaineth of the old five years to make my claim, &c. Madmen and lunatics (being strangers to the fine) shall have the like time to make their claim, &c. as infants have, and yet if this infirmity happen after the fine levied, and before the last proclamation be made, these persons are not bound to the first years, but shall have five years time after they be cured of their maladies. Women covert (estrangers to the fine) shall have five years time after they be discoverd to pursue their right. But if a *feme sole* (estranger to a fine) have present right, and after the fine levied she take a husband, and so five years pass after the proclamations had; in this case she is barred and shall have no further time to claim. Estrangers to fines, imprisoned at the time of the fine levied, shall have the same time and liberty infants have, but if such imprisonment happen after the time of the fine levied and before the last proclamation made, it seemeth they shall have five years after the enlargement. And estrangers to fines being out of the realm at the time of the levying thereof, shall have five years time after their return to enter or claim, &c. But if they be in *England* at the time of levying of the fine, and after go beyond the seas, and suffer the five years after the proclamations to pass; in this case they shall have no longer time, except they be sent in the king's service and by his commandment. * And if the party be beyond the sea at the time of the fine levied, and never return but die there; it seems in this case the fine will not bar his heir at all (d).

Plow. 366.
375.

Plow. 375.
379.

Plow. 366.
366. 375.

Plow. 366.

* Sir Tho. Cotton's case,
27 Eliz.

Plow. 375.
Dier, 133.

* Estrangers to fines that have divers defects and infirmities, as infancy, coverture, non-sanity of mind, imprisonment, absence out of the realm, to avoid fines shall have time for five years after the last of the infirmities removed. But if they have divers impediments, and they be all once after the proclamations made wholly removed, and after they fall into the like again and die, in this case their heirs shall not have a new five years, but the first five years begun in their ancestors time immediately after the first impediments so removed shall proceed, and *non-claim* of their heirs during all the residue of the said five years bindeth them, as their said ancestors should have been bound thereby if they had remained void of such impediments during all the said five years.

Estrangers to fines that have no present, but a future right, and that such as groweth wholly before the proclamations, if they be void of impediment shall have five years time after their right, title, claim or interest first groweth, remaineth, descendeth or cometh to them after the proclamations, And therefore if a mortgagee be dis-

Plow. 373.
Dier, 244.

(d) The heir, supposing him to be free from disabilities, will be bound unless he asserts his right within five years from his ancestor's death; *Dillon v. Leman*, 2 Hen. Bl. 584. and see *Helm v. Heylock*, Cro. Car. 200.

- seised, and the disseisor doth levy a fine with proclamations, and the five years pass, and after the mortgagor payeth or tendereth the money; in this case he shall have time for five years after the tender or payment of the money to make his claim, &c. (e). So if a man levy a fine of his land whereof his wife is dowable, she shall have five years after her husband's death to make her claim, &c. and not be bound by the five years after the fine (f). ¹ So if tenant in tail levy a fine with proclamations, and after the five years dieth without issue, the donor shall have five years after his death without issue to bring his *Formedon*. ² So if lessee for life levy a fine, or make a feoffment in fee, and the feoffee doth levy a fine; in this case he in reversion or remainder shall not be bound by the next five years after the fine levied, but he shall have five years next after the death of the tenant for life, and if he die within the five years, his heirs shall have only so much time as to make up the time before his death five years. ³ So also is the law if lessee for life be disseised, and the disseisor or a stranger levy a fine; in this case he in reversion or his heirs shall have five years after the death of the tenant for life, and shall not be bound to the next five years after the time of the fine levied. ⁴ So if tenant in tail in possession levy a fine and die without issue; in this case he in the remainder shall have time for five years after the death of the tenant in tail without issue; and if he make not his claim, &c. in that time, he and his issues are barred for ever. The same law is for him in reversion or the donor, if there be no remainder. ⁵ And if tenant in tail discontinue in fee, and the discontinuee levieth a fine with proclamations, and five years do pass, and the tenant in tail dieth; in ⁶ this case his issue shall have five years after the descender to bring his *Formedon* (g). ⁷ But if
- ¹ Plow. 374.
- ² Co. 78. Plow. 373. 374.
- ³ Plow. 374. Co. 9. 305.
- ⁴ Plow. 374. 19 H. 8. 7. Co. 3. 87. 84. Dier, 3.
- ⁵ Co. 3. 87.
- ⁶ 30 El.
- ⁷ P. 33.

(e) This, it is conceived, is to be understood of the case where the mortgagor tenders the money according to the proviso or condition for redemption, for if he does not tender it according to the condition his estate is gone at law; and consequently, at law, he has no estate for the fine to affect. A court of equity, however, will not allow the mortgagor's right of redemption to be affected by any act of the mortgagee. See *Waldon v. Dux Ebor*, 1 Vern. 132. So, in equity, a fine with non-claim, levied by a mortgagor, will not affect the mortgagee's right. See 2 Ves. 482. 1 Ventr. 82. 1 Lev. 272. But this is only the doctrine of equity; for it would appear, on principle, that where a mortgage is made for a term of years, and the reversion in fee is in the mortgagor, that there his fine with proclamations and non-claim, would at law bar the mortgagee's interest in the land, though it would not affect his right to the money; and if the doctrine, that an estate of freehold may be acquired by means of going on the lands and making a feoffment is a sound doctrine; in that case, it is conceived, a feoffment and fine with non-claim, by a mortgagor in possession, would at law bar the mortgagee where the mortgage is in fee. It might be proper to declare by act of parliament, that acts by mortgagors and mortgagees should not alter the relative interests of the parties.

(f) If a wife's right of dower should not accrue till a period subsequent to her husband's death, where the husband was outlawed for treason, and sometime after his death the outlawry was reversed, in that case she will have five years to make her claim in after her right accrues. See *Lucille's case*, 13 Rep. 19.

(g) By discontinuance is to be understood, that the estate no longer continues in the course prescribed by the settlement or will creating the estate tail and remainders over. A discontinuance is effected by a tenant in tail in possession making a feoffment; a release with warranty; or by levying the *our conscience de droit come ceo*; by any of which means he converts his estate tail into a fee-simple. (*Abbot v. Burton*, 1 Salk. 590. Co. Litt. 325. and 1 Co. 44.) Such a fee-simple, however, may be avoided by the action of the person entitled in remainder or reversion, when such remainder or reversion falls into possession. As a discontinuance can only be made by a tenant in tail in possession (it cannot be made by a tenant for life in possession and the remainder-man in tail. Cro. Car. 1 Co. 76.), it follows, that if such tenant in tail conveys away his estate by lease and release or bargain

if tenant in tail discontinue rendering rent and die, and the issue accept the rent (which doth bar him for his time) and then the discontinuee levieth a fine and dieth; in this case the issue of the issue shall not be barred by the five years after the fine, but shall have five years after the death of the issue. And if one *de non sane memorie* make a feoffment, and the feoffee levy a fine, and then the feoffor die; in this case the heir shall have five years after the death of his ancestor, and not be bound by the five years next after the fine levied. Plow. 374.

5. That have future right and impediment.

Estrangers to fines, that have future right upon any cause precedent, being affected with such impediments when the right first accrueth, shall have five years after the impediment removed to make their claim, &c. And therefore infants that are born, or in their mother's womb when such right doth happen to them, women covert, mad men, lunatics, prisoners beyond the seas, shall have this time. As if a man have issue a son and a daughter, and the son doth purchase lands and die, and the daughter entereth as his heir, and is disseised by A. who levieth a fine, and five years pass without claim, and ten years after the father hath another son who is heir to his brother; he shall have in this case a new full five years after he come to his full age, for he is the first unto whom the right descended after the proclamations (h). But if a stranger to a fine, to whom a remainder or other title first accrueth after the fine, do not pursue his right within five years, hereby he and his issues are barred for ever. And in like manner if the first issue in tail, to whom the title of the tail first accrueth, neglect to make his claim, &c. within the first five years after his title accrued, hereby he

See the statutes, Plow. 366, 367. Dyer, 3. Plow. 385.

bargain and sale, and afterwards levies a fine, such fine will not work a discontinuance, (*Seymour's case*, 10 Rep. 95.) unless it is levied in pursuance of a covenant contained in the release or bargain and sale, in which case, it has been held (though whether properly or not is not so clear) that it does work one. *Doe v. Whitehead*, 2 Burr. 704. Where a feoffment or fine works a discontinuance, the issue in tail (unless the fine was with proclamations, in which case they are barred), and also the remainder-man or reversioner can only recover the estate by means of a formedon, their right of entry being taken away.

Where a discontinuance has been made by means of a feoffment, release with warranty, or by fine at common law, the tenant in tail may still levy a fine with proclamations, and by that means bar the issue in tail, who can then bring no formedon. *Zouch v. Bagfield*, 3 Co. 90. and Hob. 333. Jenk. Cent. 265.

A consequence of discontinuance is, that the persons in remainder and reversion cease to have any estate, but merely a right of entry or action, and such right cannot be transferred by grant, or by any act *inter vivos*. Not only the policy of the common law prohibited the transfer to strangers of mere rights or titles as a species of champerty, but so mischievous was the transfer of such interests formerly thought, that the legislature, the more effectually to prevent it, passed the statute of the 32 Hen. 8. c. 9. And not only is the transfer of such interests prohibited by any act *inter vivos*, but, it would seem, from a recent case (*Goodright v. Forrester*, 8 East's T. R. 552. and see 1 Tannt. 578.), that a right of entry or action cannot be devised:—such interests, however, may be released to the person in possession.

There can be no discontinuance of things lying in grant, (or incorporeal hereditaments) 1 Inst. 332 b.; nor, it is conceived, of equitable estates.

(h) If tenant in tail makes a feoffment, bargain and sale, &c. and the feoffee or bargainee levies a fine with proclamations, the issue in tail will have five years from the death of his father to avoid the fine; for as the father could not enter or claim against his own feoffment or bargain and sale, the son is the first to whom the right accrued after the fine was levied. 3 Rep. 78 a. Plowd. 374. *Penyton v. Lister*, Cro. Eliz. 896. Where a person labours under several disabilities at the same time, or under disabilities arising at different periods, but one of them arising before another is removed, in these cases, the party will have five years to avoid the fine after all the disabilities are removed. Plowd. 375. a Leon. 315. 2 Atk. 614.

is bound for ever, and the whole estate tail also. And if one abate after the death of a tenant in fee-simple, and make a feoffment upon condition, and the feoffee levy a fine, and five years pass without any claim made by his heir, hereby the heir is barred for the present, but if afterwards the condition be broken, and the abator enter, then the heir may have an assise of mort-dancestor against the abator, or enter when he will.

Flow. in
Stowel's case.

Estrangers to fines that have neither present nor future right at the time of the levying of the same fines by reason of any matter before the fines levied, whose right groweth entirely before the proclamations, or partly before and partly after, may make their claim, &c. when they please. As if a father die seised of land his elder son being professed, and the younger son entereth and is disseised, and a fine with proclamations is levied, and then the elder son is dearraigned; in this case it seems he is bound to no time. So if a tenant cease one year, and then a fine with proclamations is levied, and after the tenant ceaseth another year, the Lord may * have his *Cessavit* twenty years after the proclamations.

6. That have no right for any cause before the fine.

* P. 34.

Flow. 537.
367. 372.

And strangers to fines, that have several future rights by divers titles growing at several times, it seemeth shall have several five years to make their claims, &c. commencing from the several times that their titles do first accrue unto them. As if tenant for life, the remainder in fee, make a feoffment in fee, and the feoffee levy a fine with proclamations, and he in the remainder suffer the five years to pass: in this case he is barred of his entry upon the alienation for the forfeiture, but it hath been held that if the tenant for life die, that he shall have another five years time to bring his *Formedon* in the remainder. So if the husband make a feoffment of his wife's land to another upon condition, which is broken, and he levieth a fine of this land, and the husband hath issue by his wife and dieth; and the first five years pass and then his wife dieth, hereby he is barred of the title by the condition, but he shall have five years more to make his claim as heir to his mother. But if lands be given to *H.* for the life of *A.* the remainder to *B.* for life, the remainder to *H.* in fee, and *H.* is disseised, and after the disseisor levy a fine, and five years pass; in this case *H.* is barred both of his present and future estate, and shall have no further time to make his claim, &c. and yet if *Cestuy que vie* and he in the mesne remainder die, *H.* shall have another five years to make his claim to preserve his remainder. In like manner it is if land be given to *H.* for the life of *A.* the remainder to him for the life of *B.* the remainder to him for the life of *C.* and he is disseised, and the disseisor levieth a fine with proclamations; in this case, some say *H.* for his present right shall have five years by the first saving of the statute, and five years after the death of *A.* by the second saving of the statute. If one disseise a feme sole, and after marry her, and have issue by her, and the husband is disseised before marriage or after, and then a fine is levied with proclamations, and the husband

7. That have future rights by divers titles.

Flow. 537.
368. 372.

dieth first, and afterwards the wife dieth within the five years, the issue being full of age, the five years pass, hereby he is bound as heir to his father, but he shall have five years more after the death of his mother to make his claim, &c. *Quando duo jura in una persona concurrunt, æquum est ac si essent in diversis.*

11. How a fine shall enure and work.

Where there is a precedent agreement amongst the parties, as a feoffment or the like, there the fine shall not pass any thing, nor work by way of estoppel, but only by way of corroboration, and shall be guided by the precedent agreement. And therefore if a feoffment be made to two and their heirs, and after a fine is levied to them two and the heirs of one of them, this shall enure as a release, and shall not alter the estate, but if there be no precedent agreement it shall work as it may.

Co. 10. 96. 2. in Cromwell's case. Dyer, 157.

* P. 35.

Estoppel.
Extinguishment.

If *A.* enfeoff *B.* of certain land in fee, rendering rent, with condition of re-entry for non-payment of rent, and by indenture at the same time covenant to levy a fine of the same land to the feoffee to the uses and conditions in the deed of feoffment, and after a fine is levied *sur consauance de droit come ceo*, &c. accordingly; in this case this fine shall enure as a fine *sur release*, because the conusee hath the fee before, and it shall not enure by way of estoppel, albeit it be a fine *sur consauance de droit come ceo*, &c. And therefore the rent and condition shall remain in this case, and not be extinct.

Fitz. Estoppel, 211. Co. 2. 18 Cromwell's case.

1. Where a fine may be avoided, or not:
and how.
1. By a writ of error.

A fine may be avoided for many causes, as by the death of the parties after the consauance before the recording of it; or by coving in the procuring of it; also it may be avoided for other causes, as for some error in the proceeding in the suing out of the fine, and this is done by writ of error; but this error then that shall make a fine voidable must be notorious, because the thing is done by consent, and it is a rule in law, *Consensus tollit errorem*. And by this means if the husband and wife levy a fine, and both of them be within age; whilst either of them be within age they may avoid the fine as against them both. But if there be tenant for life, and he in remainder in tail being an infant, and they two levy a fine, and he in remainder reverse it for infancy, this shall not avoid the fine as to the tenant for life also (i). A fine also is and may be

See before at Num. 6, part 2. F.N. B. 20. f. stat. 23 El. chap. 3.

Co. 2. 77. 1. 76.

2. By a claim, entry, &c. and

sometimes

Plow. 358. 359.

(i) A fine reversed for infancy, must be reversed during the infancy. 2 Stra. 1257, and see *supra* page 7, note (f). Generally speaking, all those who are parties to the fine must join in reversing it. 9 Vin. Abr. 493. Where, however, the ground of reversal is not error in the record, but want of capacity to levy a fine in the person bringing the writ of error, as in the case of a fine levied by infant, in that case the infant alone may reverse it. *Piggot v. Harrington*, Cro. Eliz. 115. No person has a right to bring a writ of error unless he can shew, that, upon reversal, he will be entitled to the lands. 2 Bac. Abr. 537. It is said, that in the case of a brother of the half-blood, no writ of error can be brought, though if the fine had not been levied he would have been entitled to the land. 1 Inst. 14 a, p. 60.

A writ of error, to reverse a fine, cannot be maintained by a person who took any estate by the fine. 5 Rep. 39 b. So if the person entitled to reverse the fine conveys or releases all his estate and interest in the lands, he cannot afterwards maintain a writ of error. 10 Vin. Abr. 15, 16. And if a conveyance or release is made by the ancestor, the heir is precluded from bringing a writ of error, unless he is the heir in tail; and even in that case, a valid recovery suffered by the ancestor, in levying the fine, will bar the heir. *Barton v. Lever*, Cro. Eliz. 388. A writ of error, being in the nature of an appeal, must be brought in a superior court. Therefore a writ of error, to reverse a fine is usually brought in the Court of King's Bench, because that court has an appellate jurisdiction in

Co. 9. 106.

sometimes avoided, or at least lose much of its force by the claim, entry, or action of him that hath right to the claim, &c. may land: be made.

the Court of Common Pleas. Where, however, the error consists in some defect in the proceedings, or in some matter of fact (as infancy in the consor), and not from any fault in the court, the writ of error must be brought in the same court in which the fine is levied. By the statute of the 34 & 35 of H. 8. c. 26, it is provided, that all errors in fines levied before the justices of Wales shall be redressed by writ of error, to be sued out of the king's chancery in England, returnable before the king's justices of his bench in England. And by the statute 43 Eliz. c. 15. s. 6, it is provided, that all fines levied in the county of the city of Chester pursuant to that act, shall be subject to be reversed upon writs of error to be sued and prosecuted before the high justice of the county palatine of Chester, as other judgments given in the portmoot court.

It may be proper to observe, that a writ of error can only be brought to reverse a judgment in a court of record. To amend errors in a court which is not a court of record, the proper mode of proceeding is by a writ of *false judgment*, returnable in the Court of Common Pleas. 1 Inst. 288 b. 13 Vin. Abr. 107. A fine levied in the Common Pleas of lands held in ancient demesne may be reversed by the lord by a writ of *deceit* in the King's Bench. 2 Inst. 214. *Rex v. Mead*, 2 Wils. Rep. 17. 1 Com. Rep. 126. Where only a part of the lands comprised in the fine are held in ancient demesne, though the court will reverse the fine as to the ancient demesne lands, it will remain good as to the rest. 1 Leo. 290. 9 Vin. Abr. 582. In order to reverse a fine, the writ of error must be brought against some of those who were parties or privies to the fine. 1 Salk. 339. Rep. Temp. Holt, 614. The court, however, will not in general reverse a fine unless a *scire facias* is returned against the persons in possession of the lands.

Although a fine may be reversed as to part of the lands, and remain good as to the rest, yet it cannot be reversed *in toto* as to one person and remain good *in toto* as to another. *Zouch v. Thompson*, 1 Lord Raym. Rep. 179.

To a writ of error to reverse a fine, the defendant cannot plead non-claim on the very fine which is sought to be reversed. *Cockman v. Turner*, T. Raym. 461. T. Jones, 181.

Though in actions for the recovery of dower it is a rule that the parol shall not demur on account of the infancy of the heir, yet where a man and his wife levy a fine, and the wife after her husband's death brings a writ of error to reverse the fine in order to recover her dower, there the rule is held not to prevail, but that the parol shall demur. *Herbert v. Binion*, Cro. Jac. 392.

The grounds or causes for the reversal of fines are, either *in fact*, as that the consor was an infant; or *in law*, as from some defect appearing on the face of the record. Nothing, however, can be assigned for error *in fact* in contradiction to the record; as for instance, where a fine is acknowledged *in court*, the plaintiff in error cannot assign for error, that the consor died before the writ of covenant was sued out. *Wright v. Mayor of Wickham*, Cro. Eliz. 461. Nor can an averment be made that the consor died before the *teste* of the writ of *dedimus potestatem* where it appears from the certificate of the concord that he was alive. *Dyer*, 89 b. And where the entry of the king's silver before the death of the consor appear upon the record, no averment can be made against it. *Farmer's case*, Hob. 330. *Dyer*, 220 b. *Anon.* 2 Ventr. 47; and see page 3, note (d).

It is enacted by the statute 23 Eliz. c. 3, that no fine shall be reversed for false or incongruous Latin, rasure, interlining, misentering of any proclamations, mis-returning or not returning of the sheriff, or want of form in words, and not in substance; and by the statute 10 & 11 W. 3. c. 14, a writ of error to reverse a fine must be brought and prosecuted within twenty years after the levying of the fine, not from the time the right accrues. 2 Stra. 1257.

When a fine is reversed for error its operation is totally destroyed; except, as we have seen, where it comprises both lands held in frank-fee and in ancient demesne; in which case the fine may be reversed, by the lord, as to the latter, but it will remain good as to the former. Another exception may be also noticed, which is, where a tenant to the precipe is made by fine; for notwithstanding the fine is reversed for error, it will nevertheless operate so as to support the recovery, provided it was entered before the reversal of the fine. It is said that where a fine is reversed for error, a contingent remainder, destroyed by such fine, will not be restored, except the reversal is by act of parliament. It is conceived, however, that if the contingency does not happen till after the reversal, that the remainder may take effect.

It may be proper to observe, that the Court of Common Pleas will in some cases vacate a fine upon motion notwithstanding it has been completed, and not put the parties to the trouble and expence of bringing a writ of error. In a case where a husband had prevailed upon his wife, who was under age, to levy a fine, the court, upon motion, ordered it to be vacated. *Hutchinson's case*, 2 Lev. 36, and see Show. Rep. 281.

Although a fine can only be reversed by writ of error, yet there are three other ways by which its effects may be avoided: one by matter of record, as by a real action commenced within a year and a day after the levying of the fine; and two by acts *in pais*; as by an entry upon the lands by the person having a right to them, and if that cannot be peaceably done by reason of personal danger, then by bringing a claim as near to them as he safely can. By the act, however, of the 4 Ann. c. 16. s. 16, no writ or claim to avoid a fine with proclamations, is of any avail, unless followed up by an action commenced within one year after making such entry or claim, and prosecuted with effect. Before the act of the 4 H. 7. c. 24. there was another mode of avoiding the effect of a fine, viz. by entering

land: for if the estate, contained in a fine, be once within five years after proclamations lawfully defeated, the party hath

entering a claim on the record of the fine itself, but the act just noticed requires that all persons who are affected by fines, must pursue their rights by *action or lawful entry*. The action mentioned in the act of the 4 H. 7. c. 24. must be a real action; an ejectment will not do. Comb. 249. But the action mentioned in the 4th of Ann. is a mere possessory action, and consequently an entry may be followed up by an action of ejectment. It will be proper briefly to enquire in what cases a real action must be resorted to in order to avoid a fine, and in what cases an entry or claim, followed up by a mere possessory action, will be sufficient. Wherever a fine works a discontinuance (which, we have seen, it does when levied by a tenant in tail in possession, but not otherwise), there the *issue in tail* (unless the fine is a fine with proclamations, in which case they are barred), and also the remainder-man and reversioner must resort to a real action, and can only recover the lands by means of a *formedon*, either in descender, remainder, or reverter, and which, if the fine was with proclamations, must be brought within five years after the right accrues in possession; or if the party was under any disability, then within five years after the removal of the disability; but if it was a fine without proclamations, then the *formedon* may be brought at any time within twenty years after the right accrues or ten years after the disability removed. See 21 Jac. 1. c. 16. Where a fine *deveats* an estate, but does not discontinue it (which is the case where a fine with proclamations is levied by a tenant for life in possession* and which fine purports to pass the fee; or by a tenant in tail in remainder, or, in short, by any person, it is conceived, having an estate of freehold or inheritance, either by right or by wrong, and either in possession or remainder, except in the case of a tenant in tail in possession), there the person claiming against the fine may make an entry and maintain an ejectment. The entry, however, must be made for the *express purpose* of avoiding the fine, and *must be actually made* before an ejectment can be maintained. *Clerk v. Rowell*, 1 Mod. 10. *Doe v. Hicks*, 7 T. R. 433. The entry too must be made prior to the day on which the demise in the ejectment is laid. In cases where the estate is neither discontinued or *deveated* by the operation of the fine (as where the fine is either levied by a person who has no estate of freehold either by right or wrong, or where it is levied without proclamations, *Jenkins v. Pritchard*, 2 Wils. 45; *Barrington v. Perikurst*, 2 Stra. 1086; *Clark v. Pyrell*, 1 Saund. 519.), there neither an action or an entry is necessary to avoid it. It is, in fact, void *ab initio*, and consequently there can be no necessity for doing any act to avoid that which is already void. The party, therefore, entitled to the lands may pursue his right exactly as if no fine had been levied; and if the fine should be set up, he may plead, that none of the parties to it had any estate of freehold in the lands at the time of its being levied: *Dyer* §15 b. Co. Read. 12. 2 Inst. 523. In a recent case (*Fenn v. Smart*, 12 East's T. R. 451.) the court said, "they could not find any case which established a difference between tenant for life and tenant for years, as to the necessity of an entry to avoid their estates in case of a forfeiture incurred by the levying of a fine, but an entry was necessary against both." But this doctrine it is conceived is not sound, when applied to the case of a fine by a tenant for years where no feoffment had been previously made, or to the case of a fine without proclamations.

From what has just been stated, it will be perceived, that where a fine is levied by a person who has no estate of freehold, that there the fine does not *deveat* any estate or interest. It might perhaps be inferred from this, that the converse of the position must always hold good, and consequently that wherever the person levying the fine is *seised of an estate of freehold*, that there all estates and interests in strangers to the fine, *must be deveated*. According, however, to authorities in the books, it would appear, that there may be estates or interests which are not *deveated*, even where the fine is levied by a person who is *seised of an estate of freehold*, and that such estates or interests are not barred by non-claim on the fine; for it is held, that a fine and non-claim bars no estate or interest that is not *deveated*. It appears difficult, however, to reconcile these authorities either with other authorities, or with the true meaning of the act of the 4 H. 7. c. 24. To notice the cases on the subject under consideration will tend to elucidate it. In the case of *Edwards v. Slater* (Hard. 410.) a man settled lands to the use of himself for life, and if he should settle a jointure on his wife, and make a lease for thirty-one years, *to commence after his death*, that then the trustees should stand *seised* to such uses. He made a lease accordingly, and afterwards he and his wife levied a fine with proclamations: the trustees of the fine neglected to enter within five years after the husband's death, and it was held, that the lease was not barred, because *being a future interest, at the time the fine was levied, it was not deveated or displaced by the fine*. But how, it may be asked, is this case to be reconciled with the cases in which it has been held, that a term of years to commence *in futuro* will be barred by a fine levied before the term takes effect in possession and five years non-claim after it commenced in possession? (*Saffyn's case*, 5 Rep. 123. Cro. Jac. 60. and *Stanford's case*, cited Cro. Jac. 61.) Or how is it to be reconciled with the act of the 4 H. 7. which says, that fines with proclamations (levied of course by persons with such an estate as authorises them to levy fines, viz. an estate of freehold

* In the case of *Williams v. Thomas*, 12 East's T. R. 141. the court seems to have held, that a fine by a tenant for life in possession did not *deveat* the remainder and put the remainder-man to his right of entry. It does not appear however whether the fine was levied with proclamations, but if it was the soundness of the decision in the case of *Williams v. Thomas* may be open to doubt.

hath thereby lost his whole estate both against him which did reverse the same, and against all others which had right or title paramount and made no claim within the five years, albeit he which doth bring the action have no judgment and execution within seven years after the proclamations. In like manner if there be tenant for life, the remainder for life, the remainder in fee; and the first tenant for life alien, and the alienee levy a fine with proclamations, and the second tenant for life claim or enter, &c. this doth make void the fine both against him, and against him in remainder also: for it is a rule, that any one that hath any estate in possession or reversion which will be barred by the fine when it is levied, may make a claim or entry to prevent the bar of the fine. As tenant for his own, or for another's life, tenant for years, he in reversion or remainder after an estate for life or years, a copyholder, or the lord, a guardian in nature, or nurture, may avoid a fine. And this they may do for themselves and others, and for others without authority precedent or assent subsequent, and the claim of one of them in this case shall avail the other. And by authority also any other man may make a claim, entry, &c. in this case, for him that hath right, and so he may do also without any authority precedent, if the party for whom he doth it do afterwards agree and assent unto it. But a * stranger of his own head (unless perhaps it be for an infant) cannot make such a claim or entry to prevent the bar of a fine, except he that hath the right do give him authority before it be done, so to do, or do agree to it after it is done. And therefore if a stranger of his own head will make an entry or claim into land whereof a fine is levied, whereunto I have right, and he do it to my use, and I do not agree to it within the five years, this entry or claim will not avoid the fine. And yet it was held by Justice *Doderidge*, *M. 2 Car. B. R.* that if a stranger enter in my name and to my use that have the right, this

* P. 36.

and five years non-claim shall bar all strangers to the fine? The act does not make one exception. It will not therefore be easy to reconcile such cases as the case of *Edwards v. Slater* either with the letter or the spirit of the act. Supposing, too, that no estate or interest can be barred by a fine unless it is previously *devested* (that is, devested previous to the fine working a bar; for it is not necessary, it is conceived, that it should be devested previous to the levying of the fine or by the operation of the fine itself); is it not, in fact, *devested* where the person entitled to it is kept out of possession by an adverse possession? Devesting is nothing more than putting out of possession. In the case of *Edwards v. Slater*, was not the possession of the parties claiming under the fine adverse to the title of the trustees of the term? Was not, therefore, the estate of the trustees *devested*? It is, however, by the spirit and intention of the act of the 4 H. 7. c. 24. that we are to determine whether a fine has operated as a bar or not: and on this ground it would appear difficult to conceive a case, in which a fine with proclamations, levied by a person with an estate of freehold, and five years non-claim after the other party's right of possession accrued, does not operate as a bar; provided such other party is free from disabilities. On this ground (though contrary to the received opinion) a rent, common, or other interest, collateral to or issuing out of land, may, it is conceived, be barred by a fine levied on the lands and five years non-claim, after the rent, &c. becomes due. The words of the act are sufficiently comprehensive to reach such interests; and it cannot be shewn, it is apprehended, that they are not within its intention. Even if *devesting* of such an interest is necessary to make a fine and non-claim operate as a bar (and this is not disputed if *adverse possession* is all that is meant by *devesting*), what more can be required to constitute *devesting*, or *adverse possession*, than holding the lands without any recognition of the right of the party entitled to the rent, &c.? In short, it is the effect, it is conceived, of the party entitled, to assert his right within a given time, and that only, which makes a fine with proclamations and non-claim, levied by a person with an estate of freehold, operate as a bar.

† both

doth vest the estate in me before agreement, and I shall be said to agree until I do disagree (*k*).

3. By a plea. A fine also may be, and sometimes is, avoided by plea, as by averment of the continuance of seisin of the land in another, at, and before the time of the fine levied, and that *partes finis nihil habuerunt tempore levationis finis*, and then he must shew in whom the estate was. As if lessee for years, or a disseisee, levy a fine to a stranger that hath nothing in the land, or *A.* be disseised by *B.* and *B.* be disseised by *C.* and *B.* levy a fine to *D.* or one that hath a right of a remainder only; or a disseisor make a gift in tail, and the donee make a feoffment to *A.* and after levy a fine to a stranger that hath nothing in the land. But this plea it seems neither parties nor privies, albeit they be issues in tail, may have at this day, but strangers only; and therefore in the last case, the disseisor, and not the issue in tail, may avoid this fine by this plea. But if a collateral ancestor, of whom the issue in tail doth not claim the land, levy such a fine, the issue may by this plea avoid it. It seems also the issue in tail may have this plea to a fine *sur release* only.

Stat. 4 H. 7. c. 24. Co. 3. 141. 83. Dyer, 331.

Also there is a plea by which (as it seems) a fine hath been avoidable, which in effect is nothing else but an averment of seisin still in the demandant or plaintiff, or his heirs, before, at, and after the time of the fine levied. And this plea (as it seems) no man may have at this day but the issue in tail only, to avoid a fine levied *sur grant & render*, by the ancestor in tail, and not to avoid a fine levied *sur consuance de droit come ceo que il ad de son done*, &c. and a feme covert, to avoid a fine levied by her husband alone.

Co. 3. 84. Dyer, 334. 290. Stat. 27 E. 1. c. 1.

4. By a vacat. If there be two of one name, and one of them levy a fine of the land of the other, or a stranger levy a fine in the name of him that is owner of the land; in both these cases the fine may be avoided by pleading the special matter. And yet some hold that in this case the party hath no remedy but by action of deceit (*l*).

34 H. 6. 19. 19 H. 6. 44.

A fine also is, and sometimes may be, avoided by the sentence of a court, when it appeareth to be gotten and obtained by some notorious fraud or practice (*m*).

- * P. 37. * And now it is high time we come to the second kind of

(*k*) The claim to avoid a fine must be of such a nature as corresponds with the estate, and therefore an entry on the land by a *cestui que trust* is not sufficient to avoid a fine, but it must be by a bill in chancery. 1 Ch. Ca. 268. 278. 2 Bl. Rep. 993. But it is said a claim to avoid a fine by bill in chancery is not sufficient, and that it ought to be by action. Per Catlin, Dalt. 116, pl. 9. 16 Eliz. Anon. Filing a bill for equitable relief is equivalent to bringing an action in its effect of preventing a fine from being set up as a bar; but filing a bill for a *discovery* merely, was held by the lords commissioners in 1783, not to be so in the case of *Pinke v. Thornycroft*, Bro. Rep. in Ch. 289; but that decree was reversed in Dom. Proc. in 1785. See further Vin. Fine (G a). Com. Dig. Claim (B).

(*l*) See *Herbert's case*, 12 Rep. 123. Cro. Eliz. 531. By the act of the 21 Jac. 1. c. 26. levying a fine in the name of any other person not privy or consenting thereto, is made a capital offence.

(*m*) Where a party is in possession under a forged or fraudulent deed or will, the levying a fine will not mend his title, but a court of equity will treat the case as if no fine had been levied. *Baker v. Pritchard*, 2 Atk. 387. *Cartwright v. Pulteney*, Ib. 381. *Wilby v. Wilby*, Toth. 99. *St. John v. Turner*, 1 Ves. 289. *Coleby v. Smith*, 1 Vern. 205. *Woodhouse v. Brayfield*, 2 Vern. 307.

common assurances made by matter of record, viz. a common recovery (n).

(n) The general objects for which fines are levied, are, to pass the estate of a married woman, to bar her dower or jointure, to bar an estate tail, or to gain or confirm a title by non-claim. The power which a tenant in tail has to levy a fine under the statutes of the 4 H. 7. and the 32 H. 8. is so inseparably incident to an estate tail, that there is no mode by which he can be restrained from exercising the power. See Fearn's Cont. Rem.

Where, however, a tenant in tail has not the immediate reversion in fee, a fine with proclamations, though it will destroy the estate tail, will only acquire a base fee, determinable upon the failure of the issue in tail, unless the fine is levied by a tenant in tail in possession, in which case it discontinues the estate tail and passes the fee-simple under a new title. Upon failure, however, of the issue in tail, the remainder-man or reversioner has five years within which to recover the estate by *formeda*. Where a tenant in tail therefore with remainders over, or the reversion in fee in a third person, wishes to acquire an absolute fee, he must suffer a recovery; and even where he has the immediate reversion in fee in himself, yet if he has acquired such reversion by descent from his ancestors, or from any third person, and there is any reason to apprehend that it may be incumbered, in that case a recovery should be suffered; for a fine (by converting the estate tail into a base fee, and by the merger of such base fee in the absolute fee) would bring the reversion into possession; and all leases, charges, and incumbrances which affected the reversion, would become immediate charges upon the estate. Wherever, therefore, a tenant in tail with the immediate reversion in fee in himself, has reason to think that the reversion may be incumbered, *there* he should suffer a recovery, and not levy a fine; for the recovery, instead of bringing the reversion into possession, destroys it; and consequently destroys all charges and incumbrances which affected it. As to incumbrances, however, which the tenant in tail himself has brought upon the estate, he cannot get quit of them by suffering a recovery: on the contrary, whether he suffers a recovery, or levies a fine, the fine or recovery will operate as a confirmation of such incumbrances. See *Halbeach v. Sambeach*, Winch, 102. *Symonds v. Cadmore*, 1 Show. 370. 4 Mod. 1. and see 3 Atk. 376. And the fine or recovery will have this operation not only where levied or suffered to the use of the tenant in tail himself, but even where levied or suffered to the use of purchaser without notice, unless, indeed, the incumbrances were mere equitable ones; in which case a purchaser without notice, who had got the legal estate, would not be affected by them. It may be proper to observe, however, that if the fine was with proclamations, and levied by a person with an estate of freehold, that *there* the incumbrances would be barred by non-claim on the fine.

On the principle that a fine rather affirms than defeats charges and incumbrances which have been brought on the estate by the consor, courts of equity will carry marriage articles into execution, notwithstanding a fine may have been levied to other uses. *Treco v. Treco*, 1 P. Wms. 622. 2 Bro. P. C. 122. *Powell v. Price*, 2 P. Wms. 535. *Streetfield v. Streetfield*, Cas. Temp. Talb. 176. *West v. Errissey*, 2 P. Wms. 349. This, however, must be understood of cases where such other uses are declared in favor of the consor himself, of volunteers, or in favor of a purchaser or incumbrancer who had notice of the marriage articles.

If a person levies a fine and either declares no uses of it, or declares the use to himself, the fine will operate as a *revocation of a former will*, 3 P. Wms. 170; *a fortiori*, will it do so where the use is declared to other persons: and if he makes a will after acknowledging the concord and declaring the uses to himself, but before the return day of the writ of covenant, the fine; it is conceived (notwithstanding a doubt which has been expressed upon the point), will operate as a revocation; for the fine, in such a case, only taking effect from the return day of the writ of covenant, it must necessarily be considered as levied after the execution of the will, notwithstanding the acknowledgment of the concord and declaration of the uses were prior to its execution. Where a fine is levied for the mere purpose of confirming a partition, in that case there will be no revocation. See *Luther v. Kidby*, 8 Vin. Abr. 148. 3 P. Wms. 169.

Persons with rights of re-entry, shifting and springing uses, executory devises, &c. may be barred by means of a fine with proclamations and non-claim. So powers appendant, or in gross, may be barred by a fine levied by the person having such powers. But a power simply collateral can not. So shifting and springing uses and executory devises cannot be barred by a person with an antecedent estate of freehold, as a contingent remainder may. But for fuller information on these subjects, the student should consult Mr. Fearn's Treatise on Contingent Remainders and Executory Devises, and Mr. Sugden's Treatise on Powers.

A fine by a disseisor; by a person who enters and is seised under a defective conveyance purporting to convey an estate of freehold, or under a void devise; or by the heir at law who enters and holds against the devisee where the devise is valid; in all these cases a fine with proclamations and non-claim will work a bar.

Fines are generally levied to uses. The fine, however, must transfer at least a legal estate of freehold to the donee, otherwise no use, properly speaking, can be declared upon it. Upon a fine *par cessit* no use can be declared. If it should be declared that the donee of such a fine should be seized to uses, the statute of uses would have no operation, but the uses would be mere trusts in equity, the legal estate still residing in the donee. So where a fine is levied of a mere equitable estate, no uses, properly speaking, can be declared of such a fine. The uses which are declared will, however, operate the equitable interest.

The uses of a fine should, generally speaking, be declared by all the parties who part with any interest

interest by the fine, that is, by all the consors: for if any of the consors should not join in declaring the uses, the use would result so far as respected the interest of such consor, unless such consor had received a consideration for his interest, which would prevent the use from resulting. So the use will be prevented from resulting where the fine is levied to effectuate any particular purpose, in order to accomplish which, it is necessary that the use should reside in the consor, as where it is levied in order to make the consor tenant to the *præcipe*. See *Alham v. Anglesey*, Gilb. Eq. Cas. 16. So where husband and wife levy a fine, it is said, that if the husband alone declares the uses, such uses will be good, unless the wife disagrees to them during the coverture. But as such uses may be secretly declared, suppose the wife should be entirely ignorant of them, would she then be bound by them? There appears indeed great reason to doubt the soundness of the doctrine just noticed. Its unreasonableness may well render it *doubtful*, and it is perhaps tolerably clear that it is not consistent with the statute of frauds, which requires uses to be declared in writing "by the party who is enabled by law to declare the same." But is the husband, it may be asked, enabled by law to declare the uses of a fine of his wife's lands? To answer in the affirmative, and merely to adduce in support of such answer, the case in which such a doctrine was laid down* could not be considered as a satisfactory answer. Look too at the consequences such a doctrine might lead to. A married woman may be induced to levy a fine of her estate for one purpose, whilst her husband may go and declare the uses of it to quite a different purpose. It may be proper, too, to observe, that the doctrine under consideration was laid down in a case determined prior to the making of the statute of frauds; so that even admitting the doctrine to have been a sound one before the statute was made, yet it must be altered it is conceived by the statute.

As the husband alone, we may conclude, cannot declare the uses of a fine of his wife's estate, so the wife alone cannot declare the uses of it; they must *join* in the declaration.

Though it is usual for the consor to join in the declaration of uses, yet it is not essentially necessary that he should do so. It is always, however, desirable that he should do so; for where he does not, there is, at least, room to suspect that there may have been some other declaration of the uses than the one produced, and which may have been in favor of the consor himself. Even the circumstance of there having been no change in the possession of the lands, does not afford conclusive evidence that there has been no such declaration. The possession remaining unchanged may accord with a declaration of the uses in the consor's favor as a mortgagee, annuitant, &c.

The uses of fines are sometimes declared before the fine is levied, and sometimes after it is levied. In the former case the instrument declaring the uses is called a *deed to lead the uses*, and, in the latter, a *deed declaring the uses*. But this distinction, so far as concerns the mere denomination of the instrument, is rather fanciful than of any importance, for both are deeds *declaring the uses*. So far, however, as respects the effects or operation of the instruments, there is a substantial difference, which will be presently noticed. Where no uses are declared previous to levying the fine, they either remain in the consor or result to the consor, according to the circumstances of the case. With respect to deeds *leading* the uses of fines, it may be proper to observe, that the uses declared by a prior deed may be varied or altered by a subsequent deed executed *before* the fine is levied†. But such subsequent deed, it is presumed, must be executed by all the parties who took any interest under the former deed, *Stapylton v. Stapylton*, 1 Atk. 7; unless they were mere volunteers, in which case it may probably be sufficient, if the parties who were competent to direct the uses declared by the former deed, execute the latter. To render such subsequent deed available as an instrument altering the uses previously declared, it is said, that it must be an instrument of at least as high and solemn a nature as the instrument declaring the former uses. *Jones v. Morley*, 1 Salk. 677. But why the subsequent instrument should be of as high and solemn a nature is not perfectly obvious in such a case. The rule *unusquodque dissolvitur eo modo quo collegatur*, may be a highly proper rule where the first instrument actually *creates an estate or binds or fixes an interest*; but in the case of an instrument *leading* the uses of a fine, no estate is created or any right or interest fixed, till the fine is levied; and therefore if the subsequent instrument would have been sufficient to have declared the uses of the fine, or, in other words, to have declared the *intention of the parties*, supposing it had been the *only* instrument, why should it not be sufficient to declare such intention, although it is not the *only* instrument? The intention of the parties is ambulatory till the fine is levied. The *last* or *most recent* expression of that intention is their real intention; and if it is expressed so as to satisfy the statute of frauds, it is sufficient, it is conceived, without at all regarding in *what way* any former intention was expressed. It may be proper to observe, however, that it is only before the fine is levied that the uses can be altered; for immediately upon the fine being levied the estate is bound by force of the statute of uses, and it is no longer in the power of the parties to alter the uses except by virtue of a power of appointment which over-reaches the uses already declared, or by a power of revocation and new appointment. If the uses should be so fixed that they cannot be altered by either of these means, in that case no new disposition can be made of the estate except by means of a conveyance under the ownership.

From what has been already observed, it will appear, that if any of the parties to a fine who pay with any interest by it do not concur in declaring the uses of it; the uses, so far as concerns their interests, will result according to such interests (2 Co. 58. Moore, 46.), except where they receive from the consor a consideration for their interests, in which case the consor may aver the use in himself

* *Beckwith's case*, 2 Rep. 57. See 3 Atk. 105.

† If a fine is levied in vacation as of a preceding term, it is presumed no alteration can be made of the uses at any time after the day on which the fine is levied by relation.

If partial uses only are declared, the residue of the use undisposed of will result; or if the whole use is declared but limited upon a contingency, the whole use, until the contingency happens, will result to the consors according to their respective interests in the estate at the time the fine was levied.

Where a tenant in tail levies a fine, and no use is declared, the use, instead of resulting so as to give him his former estate (an estate tail) will give him a fee-simple, in case the fine operates as a discontinuance; and a base or determinable fee, if it operates simply as a conveyance. Some of the authorities, indeed, on this point, are not perfectly reconcilable with the doctrine just advanced (*Walker v. Snow*, Palmer, 359. *Argol v. Cacey*, Latch. 82. Dougl. 25.) But when it is recollected, that the statute of fines says, a fine with proclamations levied by tenants in tail shall *bar the estate-tail*, and that it says, that the fine shall have this operation without saying a single word about any declaration of uses, it can hardly admit of a doubt but that the fine will give him a fee-simple or fee determinable, according as the fine did or did not work a discontinuance. And the doctrine contended for may be considered as the less doubtful, from the circumstance of its being decided, that a recovery of which no use is declared, shall enure, not to the old uses, but to the use of the tenant in tail *in fee*. See *Hedges v. Fowler*, in the Exchequer, 1777. *Maxon v. Maxon*, *ibid.* Com. Dig. Uses, D 2. *Nightingale v. Ferrers*, 3 P. Wms. 207.

By the statute of the 4 Ann. c. 16, after reciting, "that it had been doubted whether, since the making of the statute of frauds and perjuries, the declarations or creations of uses, trusts, or confidences of any fines or common recoveries manifested by deed made after the levying or suffering such fines or recoveries are good and effectual in the law," it is enacted, "that all declarations or creations of uses, trusts, or confidences, of any fines or common recoveries, of any lands, tenements, or hereditaments, manifested and proved, or which shall hereafter be manifested and proved by any deed already made, or hereafter to be made by the party who by law is entitled to declare such uses or trusts, after the levying or suffering any such fines or recoveries, are and shall be as good and effectual in the law, as if the said last-mentioned act had not been made." There can be no doubt but the uses of a fine may be declared even after the interval of many years after the fine is levied. See *Altham v. Anglesey*, Gilb. Eq. Cas. 16. Indeed they may be declared, it is presumed, at any time during the lives of the parties who part with or take any interest by the fine.

Where a fine is agreed to be levied as of a certain term and to certain uses, but it is not levied in the very term agreed upon, yet if nothing appears to the contrary, the fine will enure to the uses declared. Thus, in the case of *Jones v. Morley*, Lord Raymond said, that "though there is a variance between the deed and the fine, yet if nothing appears to the contrary, the fine shall be taken to be to the uses of the deed, and in that case the deed is not only evidence of the uses, but the fine is by construction of law to the uses of the deed." And see *Stapylton v. Stapylton*.

Where the agreement is to levy the fine as of the last term, next term, or some other term, or where the declaration of the uses is that the fine so agreed to be levied, and all other *uses*, shall enure to the intended uses, in either of these cases, a fine, though levied not strictly according to the covenant or agreement for that purpose, will nevertheless enure to the uses of the deed.

CHAP. III.

OF A COMMON RECOVERY (a).

1. Common recovery. *Quid.*

A RECOVERY in general is the obtaining of any thing unjustly taken or detained, by judgment or trial of law. And it is either a common recovery, which is such a recovery as is used for a common assurance of land; or other recovery, which is not used as an assurance of land. And the common recovery that is used for the assurance of land is nothing else but *factio juris*, or a certain form or course set down by law to be observed, for the better assuring of lands and tenements to men. And this is somewhat after the example of the recovery upon title, which is without consent and contrary to the will of him against whom the same is had: for there is in this a colourable suit, wherein there is a demandant which is called the recoveror, and a tenant which is called the recoveree, and one that is called to warrant upon a supposed warranty which is called the vouchee.

Recoveror.
Recoveree.
Vouchee.

Co. super Lit.
154. See the
Preamble of
the stat. of
23 H. 8. cap.
10. 23 Eliz.
cap. 3. Doc.
& Stud. 41.
West. Symb.
tit. Recovery.

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(a) A common recovery may be described to be an assurance by which tenant in tail may enlarge his estate tail into a fee-simple, in case the person who created the entail was seized in fee-simple at the time of creating it. If, however, he was then seized of a base or determinable fee, in that case the recovery will only enlarge the estate tail into an estate commensurate with such base or determinable fee.

In the case of an estate tail in a rent created *de novo* without any remainder over, though a recovery of the rent will bar the estate tail, yet it will only convert it into a base fee, determinable upon the death and failure of issue of the donee in tail. *Chaplin v. Chaplin*, 3 P. Wms. 229. Co. Litt. 298 a. n. 2. But where the estate tail in the rent was created by a person who at the time of creating it was seized of the rent in fee; or where the estate tail on its first creation, was limited with remainders over, and an ultimate remainder or reversion in fee to some third person; in either of these cases a recovery by the tenant in tail will acquire a fee-simple in the rent. *Smith v. Farnaby*, Siderf. 215. Carter, 52. *Weeks v. Poach*, Lutw. 1218.

Where a person is tenant in tail, with remainders over, or the reversion in a third person, he cannot in such a case acquire an immediate fee-simple by any other means than a common recovery. Remainders and reversions, indeed, may eventually be barred by a fine, with proclamations and non-claim, or by the statute of limitations of the 20 Jac. 1. c. 1.; but a recovery is the only mode by which a tenant in tail is enabled to effect a present, immediate bar of remainders and reversions. So it is the only mode by which a shifting or springing use, conditional limitation, or executory devise, where such interests are limited in defeasance of an estate tail, can be immediately barred. Such interests, however, when limited in defeasance of a fee-simple, and are so limited as to take effect within the period allowed by law, cannot be destroyed either by recovery or by any other means, except the concurrence of the parties entitled to such interests. But though a recovery is necessary in order to enable a tenant in tail to acquire a fee-simple where there are remainders over, or the reversion is in a third person, yet wherever the tenant in tail has the immediate reversion in fee in himself, there he may acquire the fee-simple by means of a fine with proclamations; and where he has taken such reversion by descent it has been held, that a purchaser of the estate cannot insist upon a recovery being suffered at the vendor's expence merely from the circumstance of its being possible that the reversion may have been conveyed away or encumbered by his, the vendor's, ancestor. *Sperling v. Trevor*, 7 Ves. 497. Where a purchaser, however, can shew, that the reversion is liable to incumbrances brought upon it by the vendor's ancestor, in that case he may insist upon a recovery; and if he will bear the difference of the expence between a fine and a recovery, there too, it is conceived, he may insist upon a recovery. Wherever, indeed, a tenant in tail with the immediate reversion in fee in himself by descent, is desirous of acquiring the fee, though not with an intention of selling, and he has any reason to suspect that the reversion may have been incumbered by his ancestor, there he ought always to suffer a recovery, as such recovery would destroy the reversion and the charges upon it; whereas a fine would bring the reversion into possession, and the charges or incumbrances brought upon it by the ancestor would be-

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The common recovery is sometimes with a single voucher; which is, when the writ is brought against him that is to pass the land, immediately, and he doth vouch over the common vouchee. And sometimes it is with a double voucher; which is when the writ is brought against another, to whom he that is to pass the land, hath aliened it, and he doth vouch him that is to make the assurance, and he doth vouch over the common vouchee: and this is the surest way, and the safest kind of recovery. In this formality of a common recovery, the course is, that by agreement of the parties a real action is begun by a writ of entry brought by him that is to have the land assured, against him that is to make the same assurance, if it be with a single voucher; or if it be with a double voucher, against him to whom he that is to make the assurance, hath aliened the land. And in this suit the recoveror that doth bring the action doth surmise that the tenant against whom the writ is brought hath no right to the land, but that the recoveror hath right thereunto, and that the tenant came to it from such a stranger whom the demandant doth name: And to this the tenant doth appear in person or by attorney, and then doth enter into defence of the land, but in pleading doth vouch to warrant; i. e. doth alledge that he bought the land of *I. S.* a stranger, who in the conveyance thereof bound himself and his heirs, to warrant and make good the title to him or them to whom it is conveyed, and thereupon he prayed that *I. S.* may be called in to defend the title, and then he * is allowed by the court to call in *I. S.* to say what he can for the justifying of his right to the land before he so conveyed it: And hereupon *I. S.* doth appear, and make shew as if he would defend the title, but doth pray a further day may be assigned him to make his defence; which being granted him by the court, at the day appointed he by agreement, covin, and assent of the parties, doth not come in but make default: And thereupon the land is to be recovered by him that

2. Quotaplex.

3. The manner and order of suffering a common recovery.

* P. 36.

See the places
before, Co. 1.
94. 10. 43. 45.

come present, immediate charges upon the estate. See *Symonds v. Cudmore*, 4 Mod. 1. 2 Salk. 338. 1 Show. 370. *Kynaston v. Clarke*, 2 Atk. 204. *Shelburne v. Biddulph*, 4 Bro. P. C. 594.

The above is a brief view of the nature and operation of a common recovery, and of the cases in which a recovery should be suffered in preference to levying a fine; and it may be observed, that the power of suffering a common recovery is one of those privileges which is so inseparably incident to an estate tail that it cannot be restrained by any condition, limitation, proviso, covenant, or in any other way whatever, except by act of parliament. See *Corbet's case*, 1 Rep. 83. *Mildmay's case*, 6 Rep. 40. *P. and Mary Portington's case*, 10 Rep. 36. And where tenant in tail has been disseised, and has returned to the disseisor, he may still suffer a recovery, which will both bar the estate tail and the remainders and reversion. 1 Rep. 135 b. and 136 a. And where a tenant in tail has levied a fine with proclamations, he may suffer a recovery, and bar the remainders and reversion. *Herbert v. Binnion*, 10 Rep. 100. And though it was once doubted, yet it is now the received opinion, that the issue in tail where his ancestor had levied a fine and acquired a base fee, may suffer a recovery and acquire the principle. And both tenant in tail and the issue in tail, though barred by fine and non-claim may defeat the remainders and reversion by being vouched in a recovery. So a tenant in tail, who has been attainted of treason, may suffer a recovery, but such recovery will enure to the benefit of the crown. 11 Rep. Abr. 324. Godb. 318.

It may be proper to observe, that where a remote remainder-man in tail suffers a common recovery, which he is vouched, and vouches over, the effect of the recovery will be merely to bar his own estate tail and the remainders and reversions expectant thereon (3 Co. 6. 8 T. R. 10. *Smith v. Clifford*, 1 T. R. 738), and all conditions and collateral limitations annexed to his estate; but it will not affect any estate or interest antecedent to his estate tail. *Smith v. Clifford*, 1 T. R. 738. On the contrary, a remainder in fee acquired by the recovery of such remote remainder-man may afterwards be destroyed by a recovery suffered by a prior tenant in tail.

brought

Recovery in
value or *pro*
rata, said.

brought the writ against the tenant, and he is left for his remedy to *I. S.* upon his warranty, and accordingly judgment is given by the court that the demandant or recoveror shall recover the land demanded against the tenant, and that the tenant shall recover so much land of *I. S.* (of his own land) in recompence for the land recovered from him which he ought to have warranted and defended but suffered to be lost. And this recovery over is called a recovery in value or *pro rata*. But if the recovery be with a double voucher, or a treble voucher, *I. S.* is upon his appearance to call or vouch to warrant *I. D.* and to alledge in the same manner as the tenant doth, and so pray that *I. D.* may come in, and thereupon *I. D.* doth appear and make default: And so if there be more vouchers; and then there must be several recoveries over in value against every one of them; but he that is the last vouchee is always the common voucher, who is one of the criers of the Court of Common Pleas, a man not worth any thing, and one that hath no land to render in value upon the supposed warranty. And by this devise grounded upon the strict principles of law, the first tenant doth willingly let go the land for the assurance of the purchaser, and yet in truth hath no recompence over, because the vouchee hath no land to render in value. And by this means if one have an estate tail in lands which he is desirous to sell, or to convert into an estate in fee-simple, the same is commonly done; for the tenant in tail doth cause the purchaser or some friend of his to bring a writ of entry against him for this land, and he appeareth to the writ, and in pleading saith that the land came to his ancestors from such a man or his ancestors, who in the conveyance bound themselves to warrant it: and thereupon that man is called in, who doth appear and make default, and thereupon judgment is had against him in manner as aforesaid. Or if he would have the recovery with a double voucher; then he by fine, feoffment, or deed of bargain and sale inrolled, discontinues the land, and then cause the recoveror that is to have the land to bring this writ of entry against the discontinuee, and he doth vouch the tenant in tail who doth vouch over the common vouchee, and so it is done; and by this the estate tail, that the tenant in tail hath or had, is barred and bound, for that it appeareth now he had no power to entail the land whereunto he had no just title, *and besides he shall recover a recompence over in value, and this is adjudged in law to go in succession of estate as the land should have done, which is the reason why the recovery is a bar to all that are in remainder and reversion as well as to the issues in tail (b).

* P. 39.

(b) The recompence in value is the reason which has been always assigned for holding the recovery to bar the issue in tail; and it would appear to be a much sounder one for holding that it also bars those in remainder and reversion as well as the issue in tail, than the one which has been assigned, viz. that the reason why the recovery bars those in remainder or reversion is, that the recoveror, by supposition of law, is in of the estate tail, and that the estate tail, by like supposition of law, continues for ever: per Lord Hale, *Hudson v. Benson*, 2 Lev. 28. In the same case, Wyld, J. observed, that the true reason of common recoveries being bars, was not the recompence in value, but that they were common conveyances. Perhaps the best reason may be, that a common recovery is the judgment of a court in favour of a person who is supposed to have a better title than the title of the tenant in tail and consequently a better than the title of the issue in tail and those in remainder and reversion, as all titles of all these rest upon the same foundation.

F. N. B. 434.
Co. 9. 6.

Experientia.

And in the suffering of these recoveries the tenants and vouchees do appear most commonly in person in court, and so the recovery is finished in the court presently without more doing, but sometimes they will not or cannot appear in person, and then they do use to appear and suffer the recovery by attorney (c). And in that case there must be a consuance for a warrant of attorney taken, to authorise the attorney or attorneys, in this manner if it be for a treble voucher.

Warrant of attorney.

West. Symb.
ubi supra.

Glouc' sa. *Prec' A. S. & B. uxori ejus quod juste, &c. redd' C. D. Manerium de N. cum pertinen' &c. quæ clam' esse jus & hered' suam & in quæ iidem A. et B. non habent ingress. nisi post disseisinam quam H. H. injuste & sine judicio fecit prefat' C. infra 30. annos jam ultim' clapeos, &c. ut dic. &c.*

Glouc' sa. *A. S. & B. po. lo. suo W. W. & R. R. attornat. suos conjunctim & divisim versus C. D. de placito terræ.*

Glouc' sa. *M. M. gen. quem A. S. & B. vocant ad warrant', po. lo. suo I. I. & L. L. attornat' suos conjunctim & divisim versus C. D. de placito terræ.*

Glouc' sa. *G. W. gen. quem M. M. voc. inde ad warrant', po. lo. suo R. G. & R. S. attornat' suos conjunctim & divisim versus C. D. de placito terræ.*

Ca. 10. 43.
Ca. 1. 94.

And in these cases to make two attorneys at the least, and to give them an authority jointly and severally, that if one of them die before the recovery be suffered, the other may have power to do and dispatch it. And these warrants of attorney for the suffering of recoveries are to be acknowledged and certified in the same manner as the consuances of fines acknowledged in the country are (d);

(c) Where a common recovery is suffered in this manner, the warrant of attorney is the foundation of the recovery. It is therefore of importance, that the acknowledgment of the warrant of attorney should be regular, otherwise it may be void, and consequently the recovery suffered in pursuance of it would be void likewise. If a tenant or vouchee who has appointed an attorney dies before the attorney has appeared the recovery will be bad; because the death of such tenant or vouchee is a determination of the authority given by the warrant of attorney. *Wynne v. Wynne*, 1 Wils. 35. So if the warrant of attorney appears to have been given after judgment, the recovery will be void; for the writ of *debetur potestatem de attornato faciendo* recites that the writ of entry is pending, which is not the case after judgment is given; and if the attorney appears before the warrant was made, his appearance is without authority and therefore bad. If a warrant of attorney bears date after the return day of the writ of entry on which a recovery is suffered, the recovery will be void, because the judgment relates back to the return day of the writ of entry. See *Shelley's case*, 1 Rep. 93. Mo. 136. and Jenk. Cent. 369.

If an insane or other incompetent person appears by attorney the recovery will be void. Where the vouchee appears by attorney, the warrant by which the attorney is appointed ought to bear date after the date of the writ of summons; the omission, however, of this circumstance will not invalidate the recovery. See *Wynne v. Lloyd*, 1 Lev. 130. Sir T. Raym. 16. 1 Sid. 213. and 1 Keb. 459. If a vouchee, who appears by attorney, dies before the return of the writ of summons, the recovery is void. *Wynne v. Wynne*, 1 Wils. Rep. 135. Where a feme covert vouches, who is under age, appears by attorney the recovery is bad, and may be reversed after she comes of age, *Stokes v. Oliver*, 5 Mod. 26; but if she had vouched in person or by guardian, the recovery could only have been reversed during her minority.

See the act of the 23 Eliz. c. 3. s. 5. relative to the taking and certifying the acknowledgment of warrants of attorney: and by a rule of the court of C. B. Hil. 14 Geo. 3. an affidavit of the acknowledgment of every warrant of attorney for suffering a recovery is necessary—wherein the party must swear that he knows the parties;—that they duly signed the warrants on the day last mentioned in the caption;—that all the parties were at the time of acknowledging of full and competent understanding;—and if a feme covert is a party, that she was solely and separately advised apart from her husband, and freely and voluntarily consented to and acknowledged her warrant of attorney;—and that the parties respectively knew that the said warrants of attorney were taken for the suffering a common recovery to pass his, her, or their estate.

Dedimus potestatem.

Examination.

* P. 40.

Habere facias seisinam.

save only, that recognisances for warrants of attorney for recoveries may be taken by any judge of the Court of Common Pleas or any serjeant at law without a *Dedimus potestatem*. But if any others take it, they use to do it by a special *Dedimus potestatem*, which is to command the commissioners therein named to come to such persons, and to take the names of their attorney or attorneys in the suit, and to certify the same into the chancery under their seals such a day (e). And if there be any woman covert that is to make the consuance, it seems she is to be examined, as in the case of the consuance of a fine (f). And when this is done, the recoveries may be suffered by the attorneys without the personal appearance of the parties. And this is as good a recovery as the other which is suffered by the persons themselves appearing in court, but that it will require longer time for the perfection of it; for in this case there must go forth a *Summons ad warrant* which must have nine returns ere the recovery can be perfected, and by that time one of the parties may be dead (g). And when the recovery is thus suffered by the parties in person, or by their attorneys, the same is to be entered by some one of the clerks of the Court of Common Pleas upon the rolls of the same court there to remain upon record. And herein there must go forth a writ of execution called an *Habere facias seisinam*, which is sent to the sheriff of the county where the land doth lie, to put the recoveror in possession of the land; (except the recovery be of a reversion of land after a lease for years of it, in which case the reversion shall be in the recoverors by a claim without any writ.) And this writ the sheriff doth return as executed according to the contents thereof, albeit in truth he never do any thing upon it (h). And after

(e) At common law a recovery could not be suffered by *de. po.* for the statute of Carlisle, 15 Ed. 2. first gave the *dedimus*. T. Raym. 71.—but see Cruise on Recoveries, 79, *contra*.

(f) According to Pig. 66, the examination is now totally disused. It is understood, however, that the fact is otherwise, and that feme coverts are examined by the serjeants at the bar when they suffer recoveries in person.

(g) Abridged to *six* returns by stat. 16 Car. 1. c. 6. s. 10. and by stat. 24 Geo. 2. c. 28. further abridged to *four* returns.

(h) Before further noticing the execution of the writ of seisin, it may be proper to say a few words respecting the judgment given in a common recovery.

If the judgment be given before the return of the writ of entry or the return of the writ of *summons ad warrantizandum* the recovery is void, because the court has no power to proceed until the return of the writ of entry and the appearance of the vouchee; and the parties are not supposed to appear until the return of the process which issues for the sole purpose of bringing them into court.

In every species of action the death of any of the parties before judgment puts an end to the suit and therefore in a common recovery if either the demandant, the tenant, or any of the vouchees die before judgment is given the recovery is void. But judgments are not always considered as actually given on the day on which they are pronounced, but have frequently relation to the first or some other day of the term in which they are given, and therefore if all the parties are living on the day in which the judgment relates the recovery will be good. 4 Rep. 71 a. 2 Bla. Rep. 735. 1 Stra. 5 and Pig. 59.

After the judgment is given the court awards a writ of *habere facias seisinam* directed to the sheriff of the county in which the lands lie, directing him to put the recoveror in possession of the land which he has recovered.

Where a recovery is suffered of a rent, common, &c. it is sufficient that the sheriff deliver *seisin* upon the land, of the rent, common, &c. by *parol*. And if a common recovery is suffered of lands which are let on leases for years, the recoverors have not the reversion presently by judgment, but must be executed by writ, entry, or claim.

after this all the same proceeding is to be exemplified by the clerk of the same court.

Co. 5. 41. 10.
37. 39. 3. 5. 6.
41. 42. Doct.
& Stud. 41. 49.
50. stat. 13
Elix. cap. 5. 23.
ca. 3. 7. H. 8.
cap. 4.

A recovery being matter of record is much of the nature of a fine, and such a thing as whereof the law taketh notice; for it is now become a formal and orderly manner of assurance of lands, and one of the common assurances of the kingdom, or a common way and means to pass land from one to another; and therefore if a tenant for life suffer such a recovery of his land it is a forfeiture of his estate (i); an use may be averred upon it as well as upon a fine (h); and it may be avoided for covin (l) as well as any other kind of conveyance. But it is of special use, and hath a special virtue to bar and bind estates in tail and all the remainders and reversions thereupon. And because many of the inheritances of the kingdom do depend upon this assurance, and it is oft times the greatest security purchasers have for their money, therefore it hath much favour from the law at this day. And therefore the law will not endure it shall be disputed against, for *Communis error facit jus*. And hence it is that it shall not be avoided for small errors, for it is another rule of law, *Consensus tollit errorem*. And if a recovery be suffered by a tenant in tail, hereby he hath not only discontinued, barred and destroyed the estate tail, and so defeated himself and his issues, the former owner of the land, and all the remainders and reversions thereupon that should take place after the estate tail, whether they be in *esse* or contingent only; but also all former estates, leases and charges made by him in remainder or reversion (m), for as when the estate tail in possession is not

4. The use, nature and operation of it.

Forfeiture.

Averment.

Covin.

barred

If a person suffers a common recovery and dies before the writ of seisin is executed, the recovery is not thereby rendered bad, but the writ of seisin may be executed against the heir. See *Sir N. Bacon's case*, Dyer, 220. pl. 13. *Shelley's case*, 1 Rep. 93. 1 Inst. 361.

The awarding of the writ of seisin, its execution, and return by the sheriff, must appear upon record; and if the awarding of the writ be not found by a special verdict, it cannot be presumed by the court. *Witham v. Lewis*, 1 Wils. 48. 4 Bro. 504. But it is conceived a new writ of seisin may be awarded.

Though the sheriff, in fact, never executes the writ of seisin by giving possession of the land or other thing of which the recovery is suffered, yet he makes a return to the writ as if he had actually done so; and after he has made this return the recovery is complete. It is, however, incomplete till the return is made; therefore, if a recovery is suffered to uses, till there is a seisin in the demandant as a means of supplying the uses (and which he cannot have till the sheriff has returned the writ of seisin), the parties claiming under the uses have no legal estate which will admit of alienation by deed; but they have an inchoate interest which it has been held they may devise by deed. *Scheyn v. Scheyn*, 2 Burr. 1131.

(f) If a copyholder for life suffers a recovery by plaint in the lord's court, it has been held to be a forfeiture. See *Kems v. Kirby*, 1 Mod. 199. 2 Mod. 32. It is only however where tenant for life suffers a recovery without the concurrence of the tenant in tail that such recovery will work a forfeiture; and if the tenant for life has himself an estate tail in remainder after prior estates in fee, no forfeiture will be incurred. See *Smith v. Clifford*, 1 T. R. 738.

(h) Since the Statute of Frands, 29 Car. 2. c. 3. uses cannot be averred or declared by parol either in a fine or recovery. Parol evidence, however, will be received to rebut a resulting use.

(l) Although a common recovery can only be reversed by the Court of Common Pleas in the first instance, and by the Court of King's Bench upon a writ of error from the Court of Common Pleas, yet the Court of Chancery can invalidate the uses of a common recovery, where it appears to have been obtained by fraud or imposition, by compelling the parties taking under the declaration of uses to convey the estate to the person who is entitled to it in equity; or by declaring them to be trustees for the person. *Ferris v. Ferris*, 2 Abr. Eq. 695. The recovery however will remain good as a bar to the estate tail and remainders.

(m) Conditions, springing uses, and collateral limitations annexed to an estate tail, and all leases and other interests subsequent to it are destroyed by a common recovery. *Benyon v. Benyon*, 1 Mod. Rep. 108. 2 Lev. 29. *Page v. Hayward*, 2 Salk. 570. Pig. 176. *Drier v. Edgar*, Cowp.

* P. 42.

form as the law requireth, viz. that there be a writ of entry brought, and appearance of the tenant *in fait*, a voucher, and an appearance of the tenant in law the vouchee, judgment and execution in manner as aforesaid; for if there be any substantial defect in these things the recovery may be thereby *avoided by writ of error; but if it be only in form it will not hurt. 4. That there be a lawful tenant to the *precipe*, i. e. that the writ of entry be brought against one that at the time of the writ brought is tenant of the freehold, either, by right, i. e. that hath an estate for life at least in the land, or by wrong, i. e. that is a disseisor of the land demanded and whereof the recovery is had. And therefore in this case the course is where the land to be recovered is in possession, and a fine and a recovery is had of it together, the fine is sued out first, for this doth make the conusee tenant of the freehold of the land (q), and then the recovery is had against him. And when the recovery is to be had of a reversion, and that there is an estate for life in being of the land whereof the recovery is to be had, (for an estate for years, or any such like estate, will not hinder the suffering of a recovery,) there the course is to get a conditional surrender from the tenant for life of his estate to him in reversion or remainder, to the end that he may be perfect tenant of the inheritance, [freehold] and then the writ of entry may be brought and the recovery had against him: for if a writ of entry be brought against

Dyer, 252.
Co. super Lit.
46. 3. 6.

Co. 3. 6. super
Lit. 46. Lit.
sect. 519.
Plow. 514.
Doct. & Stud.
49. See *infra*.

tail may suffer a recovery; but after office found the recovery would enure to the use of the crown. There are certain persons who are prohibited by act of parliament from suffering recoveries, as tenants in tail of the gift of the crown for services done to the crown; women seized in tail *ex provisione viri*, &c.; but these subjects will be further noticed in the sequel.

(q) A tenant to the *precipe* may be made by fine, feoffment, lease and release, bargain and sale, or in short by any species of conveyance proper to pass the immediate freehold; but the most usual species of conveyance is a bargain and sale enrolled, as the enrolment not only affords proof of there having been a tenant to the *precipe* where the original may be lost or destroyed, but if the estate should be sold in parcels the vendor will not be bound to give the purchasers attested copies of the bargain and sale.

As recoveries are more frequently had from the circumstance of there not being a good tenant to the *precipe* than from any other cause, it may be proper to enter pretty fully into the subject.

It now seems to be settled, that where the freehold or inheritance belongs to a married woman (i. e. the legal freehold or inheritance), the husband alone may make a good tenant to the *precipe*. See *Robinson v. Cummings*, Cas. Temp. Talb. 114. Atk. 437. But if the wife has a general power of appointment over the legal estate, she is the proper person to make the tenant to the *precipe*; or the tenant to the *precipe* may be made by the person in whom the legal freehold is vested in default of or until appointment.

If a fine is levied and no uses are declared of it, and afterwards a recovery is suffered upon a writ of entry brought against the conusee of the fine, the recovery will be good; for the use of the fine will not be considered to have resulted to the conusor, but to have resided in the conusee till the recovery was suffered; and it will be so considered even though a considerable time has elapsed between levying the fine and suffering the recovery, and even though at the time of levying the fine there was no declared intention of suffering a recovery. *Altham v. Anglessey*, Gilb. Eq. Cas. 2. 2 Salk. 676. Pig. 52. And where the tenant to the *precipe* is made by fine, the recovery will be good, notwithstanding the fine may be afterwards reversed for error (*Lloyd v. Evelyn*, 2 Salk. 568.); for it is held to be sufficient that there was a good tenant to the *precipe* at the time of giving the judgment in the recovery. See *Lacy v. Williams*, 2 Salk. 568. Pig. 30.

It is said that a feoffment when made by a person who merely goes upon the lands, though he has no estate in them, will gain a freehold and make a good tenant to the writ of entry. Pig. 41. Co. Lit. 330 b. In the case, however, of *Taylor v. Horde* (1 Burr. 60. 5 Bro. P. C. 247.), this doctrine was called in question; and, it is conceived, properly so.

Where the tenant to the *precipe* is made by bargain and sale enrolled, the recovery will be good notwithstanding the enrolment does not take place till after the term in which the recovery is suffered (*Hynde's case*, 4 Co. 71. Pig. 56.); provided such enrolment takes place within the time prescribed by the act

against a stranger, and he vouch the tenant in tail in possession of the land, and so a recovery is had, or if there be

act of the 27 Hen. 8. c. 16.; namely, within six lunar months after the execution of the bargain and sale. *Malley v. Jennings*, 2 Inst. 674. *Lellingham v. Aloop*, 2 Inst. 675. If, however, the bargain and sale should not be enrolled within due time, the instrument, though it cannot take effect as a bargain and sale, yet it may possibly operate in some other mode; as the grant of a reversion expectant on a term of years.

Where trustees are requested (as is sometimes the case) to make a tenant to the *precipe* for suffering a recovery, the question arises how far they may with safety do so. This question is more important where the trust is for preserving contingent remainders. If they do join, there is no doubt but their joining will give validity to the recovery *at law*; but if by joining they destroy, or concur in destroying estates or interests which they were expressly appointed to preserve they are certainly guilty of a breach of trust, but whether a court of equity would hold them responsible for such breach of trust, would depend altogether, it is conceived, upon the circumstances of the case. If they should join with the person who is entitled to the first estate tail in suffering a recovery, in order to enable him to settle the estate upon his marriage, or with a view to any other beneficial family arrangement, they probably would not be held liable for a breach of trust. See *Frewin v. Charlton*, 1 Eq. Ca. Abr. 380. *Basett v. Clapham*, 1 P. Wms. 358. *Winnington v. Foley*, 1 P. Wms. 536. It would seem, indeed, that where they join with the person entitled to the first estate tail that there they will not be deemed guilty of a breach of trust, (or at least not punishable for one), whatever the purpose may be for which the recovery is suffered. See *Biscoe v. Perkins*, 1 Ves. & Bea. 485.

But though there are cases in which it would appear that trustees will be justified, and not punished, for joining in suffering a recovery; yet if they should refuse to join in such a case, would a court of equity, it may be asked, compel them to do so? There are some early cases in which the court has compelled them to join where the object was, the marriage of the person entitled to the first estate tail, or some other beneficial family arrangement; (*Mallett v. Inglett*, June 1737. *Platt v. Sprigg*, 2 Vern. 303. *Charlton v. Frewin*, 1 Eq. Ca. Ab. 380. *Winnington v. Foley*, 1 P. Wms. 536.) But Lord Kenyon, when Master of the Rolls, thought that they ought not in any case to be compelled to join. (See Lord Lansdown's case cited by Lord Eldon in *Moody v. Walter*, 16 Ves. 310, and see also what was said by his Lordship, in the above noticed case of *Biscoe v. Perkins*, 1 Ves. & Bea. 492.) For the court, indeed, to say in what cases trustees should, and in what cases they should not be compelled to join, would be to exercise an unpleasant discretion. Where trustees however are willing to join, provided they have the sanction of the court, the court, it is presumed, would, in proper cases, give its sanction, though this, in its exercise, would be almost as unpleasant a discretion as to determine in what case the trustees should, and in what cases they should not be compelled to join. Perhaps, there may be some reason to think that trustees ought in no case, either to be compelled, or sanctioned, or justified in joining to destroy contingent remainders; but that a trust to which they are deliberately appointed should be honourably observed for the benefit of all the parties interested in it. To avoid however much difficulty upon the subject, the best way, in settling estates in strict settlement would always be, not to limit an immediate estate of freehold to the trustees, but merely an estate of freehold to accrue on the forfeiture of the respective tenants for life. In such a case (unless there was a forfeiture of the immediate life estate, and which rarely happens,) there would be no necessity to have the concurrence of the trustees, in suffering a recovery; for the immediate tenant for life, (supposing there was one, and he had not forfeited his life estate), would be the proper person to join in the recovery, either by being himself, or by his making the tenant to the *precipe*; and if there was no tenant for life, but the tenant in tail was tenant in tail in possession, he would not require the concurrence of any one. Unless therefore it is really the intention that no contingent remainder shall be destroyed, or recovery suffered, until a tenant in tail actually comes into possession, the limitation to preserve contingent remainders should be in the way above suggested. Where however, it is necessary, to have the concurrence of trustees to preserve contingent remainders in order to suffer a recovery, it will appear from what has been already said, that they ought to be cautious how they concur, where their concurrence may affect the interests of third persons.

Tenants for life sometimes refuse to join in making a tenant to the *precipe*, from an apprehension that their estates will merge in the remainder or reversion, and will be affected by the incumbrances of the tenant in tail. These consequences, however, may be guarded against; and the most usual, and, it is conceived, the safest way of doing so, is, for the tenant for life to convey to an indifferent person, to the use of the tenant to the *precipe* for the life of the tenant for life, subject to a proviso, that unless £100,000, (or some other large sum, much more than the value of the life estate), should be paid on a given day, (some day after the recovery will have been suffered), the use shall cease. From the magnitude of the sum, compared to the value of the life estate, it is certain it will not be paid on the given day; the estate will therefore *ipso facto* cease on that day and revert in the tenant for life according to his former title, together with all the powers and authorities which were annexed to it, and free from any incumbrances of the tenant in tail; but notwithstanding its reverting in the tenant for life, yet as the tenant to the *precipe* had an estate of freehold when the recovery was suffered the recovery will be good.

be tenant for life of land, the remainder or reversion to another in tail or in fee, and a stranger doth bring a writ of

As the tenant to the *precipe* must have the *immediate freehold*, it may be hardly necessary to observe that a person with a mere term of years or chattel interest, cannot make a good tenant to the *precipe*.

Executors to whom lands are devised for payment of debts, until the debts are paid, have only a chattel interest in the lands, (1 Inst. 42 a. 8 Rep. 96 a.), and consequently cannot make a tenant to the *precipe*. It has been said indeed, that if a person with a mere chattel interest makes a feoffment the feoffee will gain a freehold by disseisin and be a good tenant to the *precipe*; But in the case of *Taylor v. Horde*, (1 Burr. 30. Cowp. 689. 5 Bro. P. C. 247.), the Court of King's Bench, and afterwards the House of Lords, decided, and properly it is conceived, in direct opposition to this doctrine.

Until dower is assigned, the heir has the freehold, and a tenant to the *precipe* made by him without the concurrence of the widow, will support the recovery. Lit. S. 393.

Where a person has acquired a freehold by disseisin, he will be a good tenant to the *precipe*, or may make one, *Lincoln College case*, 3 Rep. 58.

In the case of joint-tenants, tenants in common, or parceners, where the intention is to suffer a recovery of the whole property, they must all join in making a tenant to the *precipe*, otherwise the recovery will only be good as to the share of the person who makes the tenant to the *precipe*.

It may be proper to observe, that if the writ of entry is brought against the person who has the immediate estate of freehold and a stranger, the recovery will be good notwithstanding the writ being brought against the stranger as well as the tenant of the freehold, for the recompence in value will go to the person who has really lost the estate. 1 Ventr. 358. *Paulin v. Hardy*, Skin. 3. 63.

Before the act of the 14 Geo. 2. c. 20. it was necessary that the tenant to the *precipe* should be actually seised of the freehold, at the latest, at the time the judgment was given, otherwise the recovery was not good. But the act just noticed, declares "That from and after the commencement of this act, every recovery already suffered, or hereafter to be suffered, shall be deemed good and valid to all intents and purposes, notwithstanding the fine or deed or deeds, making the tenant to such writ, should be levied or executed after the time of the judgment given in such recovery, and the award of the writ of seisin as aforesaid, provided the same appear to be levied or executed before the end of the term, great sessions, session or assizes, in which such recovery was suffered, and the persons joining in such recovery had a sufficient estate, and power to suffer the same."

From the expression, "appear to be executed," it has been thought, that the intention of the legislature was to make the deed making the tenant to the *precipe* itself evidence of the time of its execution, and that if it purported on the face of it to be executed before the end of the term, &c. in which the recovery is suffered, that no evidence would be allowed to prove the contrary; and consequently that the recovery would be good, although the deed was, in fact, not executed till after the term, provided it was dated within it. This construction of the act, if not obviously an erroneous one, certainly cannot be safely relied upon; for the words of the act "appear, &c." mean, it is conceived, *appear in evidence*, and do not mean the internal evidence afforded by the deed itself as to the time of its execution.

Before the act of the 14 Geo. 2. it would seem, on the authority of *Lord Say and Sele's case*, (10 Mod. 43.) that where a tenant to the *precipe* was made by *fine* the recovery would be good, even though the fine was levied after the end of the term in which the recovery was suffered, provided it was levied as of the term in which the recovery was suffered. There appears, however, to be reason to think that the act just noticed must have altered the doctrine-laid down in *Lord Say and Sele's case*, for the act says, that recoveries shall be deemed good notwithstanding the *fine*, &c. making the tenant to the *precipe*, is levied after the time of the judgment given in such recovery, provided it is levied before the end of the term, &c. in which the recovery is suffered; meaning, it is apprehended, that it must in reality be levied before the end of the term in which the recovery is suffered; and that to levy it after the term but as of the term, or by relation to the term, would not do.

The act just noticed (14 Geo. 2. c. 20.) renders it unnecessary for lessees for lives, at yearly rents, to join in making a tenant to the *precipe*. But though the act has dispensed with their concurrence, yet there is nothing in it, from which it can be fairly inferred, that a tenant to the *precipe* made by such lessees would not be good. And though their concurrence is rendered unnecessary, yet it is still necessary to have the concurrence of tenants by the curtesy, or in dower, and of persons having estates for life under marriage settlements, wills, &c.; or in short having estates of freehold in possession by any other means than by leases at reserved rents. And whether the person who has the immediate freehold takes it under the same settlement or will under which the tenant in tail takes, or under any other conveyance or will is not material; for his concurrence, (unless a mere lessee for lives or life at a reserved rent) is necessary in order to make a good tenant to the *precipe*.

As it is not settled that an equitable estate tail and remainders over can be barred by any other means than by a recovery, (see *supra*, page 13, note (g)), in order to render such a recovery valid, the writ of covenant must be either brought against the person who has the immediate equitable freehold, or he must make the tenant to the *precipe*. But though the owner of the equitable freehold must concur in suffering an equitable recovery, yet it is not necessary that the owner of the equitable or beneficial freehold

of entry against him in the remainder or reversion, or against a stranger who doth vouch him, and so a recovery is

freehold should be a distinct person from the owner of the legal freehold; for if the owner of the legal freehold has also the equitable or beneficial freehold he may make a good tenant to the *precipe* for suffering an equitable recovery; for in such a case the tenant in tail has clearly as much the concurrence of the person who has the equitable or beneficial freehold, as where such equitable or beneficial freehold exists separately from the legal freehold. *Phillips v. Bridges*, 3 Ves. 120. It appears to be thought, that a good tenant to the *precipe* for suffering an equitable recovery, may be made by a person who has a mere equity of redemption, on the ground, that the equity of redemption constitutes the beneficial ownership of the property. It cannot be doubted, however, that the mortgagee has an equitable interest in the estate, as well as the mortgagor, and therefore there is reason to think, that in such a case a good tenant to the *precipe* for suffering an equitable recovery can only be made by both the mortgagor and mortgagee.

If a mere equitable estate is conveyed in trust for a third person, such third person is the beneficial owner of the property and is therefore the proper person to make an equitable tenant to the *precipe*, and not the person to whom the estate is conveyed, who has in fact neither a legal or equitable interest in the property; so that his concurrence in making a tenant to the *precipe* for suffering an equitable recovery appears to be in no wise necessary. If a married woman is entitled for her life to the rents of the estate for her separate use, she is the proper person to make the tenant to the *precipe* for suffering an equitable recovery.

Having stated pretty fully by what means and by whom a tenant to the *precipe* may be made; it may be proper to state that the concurrence of the person, having the immediate estate of freehold, in making the tenant to the *precipe* is sometimes presumed; as where the possession has long accompanied the title under the recovery; (*Green v. Proude*, 1 Mod. Rep. 117.) or where there has been collateral evidence to raise the presumption of a conveyance or surrender to the tenant to the *precipe* by the person in whom the freehold was vested; as entries in the attorney's books of a surrender prepared and paid for. *Worsam on the dem. of Webb v. Grenville*, 2 Stra. 1129. 2 Burr. 1071. But where any act is done by the tenant for life as owner, subsequent to the recovery, inconsistent with the presumption of his having conveyed his life estate to the tenant to the *precipe*, such act repels the presumption of his having conveyed it. (*See Barley's case*, 3 Mod. 210.) Though query whether a conditional surrender might not be presumed in such a case?

So where the freehold is in a trustee for a tenant in tail and under his power and direction, there it is reasonable to presume that his concurrence was obtained. *Brydges v. Chandos*, 2 Burr. 1065. And where the person interested to object against the validity of the recovery has had an opportunity to object to it, but instead of doing so has acquiesced in it and not at all disputed its validity, his acquiescence affords a presumption that the recovery was properly suffered. *Brydges v. Chandos*, 2 Burr. 1065. The mere fact, however, of a remainder-man in tail suffering a recovery, is not of itself a sufficient ground on which to presume a surrender of the life estate; for if it was, it would be in the power of every remainder-man in tail to bar the estate tail without any concurrence on the part of the tenant for life; whereas his concurrence must be always either actually obtained or presumed, and it will never be presumed unless on good grounds.

Where the deeds were suppressed by the tenant for life, so that it could not be made out whether he had surrendered his estate for life or not, it was decreed for the recovery without allowing a trial law; for where deeds are suppressed every presumption is made against the party suppressing them. *Gartside v. Radcliffe*, 1 Ch. Ca. 292.

Under the act of the 14 Geo. 3. c. 20. a recovery may in certain cases be good, even though there never been a tenant to the *precipe*. By this act it is enacted, "That every common recovery, already suffered, or hereafter to be suffered, shall, after the expiration of twenty years from the date of the suffering thereof, be deemed good and valid to all intents and purposes, if it appears on the face of such recovery, that there was a tenant to the writ; and if the persons joining in such recovery, had a sufficient estate to suffer the same, notwithstanding the deed for making the tenant to such writ should be lost or not appear."

The act, it may be observed, does not extend to cases in which the deed making the tenant to the *precipe* is produced. Therefore if the deed is produced a recovery may be defeated which otherwise would have been presumed to have been good. Wherever the deed, however, making the tenant to the *precipe* does not appear, it would be dangerous for a purchaser to complete his contract; for had the deed being lost or destroyed, or instead of there never having been any such deed, an imperfect or insufficient deed might afterwards be produced, and consequently the recovery might be invalidated.

Generally speaking, a recovery suffered by tenant in tail without a good tenant to the *precipe*, is voidable by the issue in tail and those in remainder or reversion; but though voidable by them it is a bar to the tenant in tail himself. *Lincoln College Case*, 3 Rep. 59. *Owen and Morgan's Case*, 3 Rep. 5. *Lord Say and Sele's Case*, 10 Mod. 40.

Where a recovery cannot be sustained in any of the ways above noticed but is clearly bad, and the parties are desirous of suffering a new one, great care must be taken to obtain the concurrence of all necessary

is had; these recoveries are not good. And yet if the writ be brought against the tenant of the land and a stranger that had nothing in the land together, and so a recovery be had; this recovery is good enough. And if a disseisor make a gift in tail of the land to another, and the writ is brought against him, and he vouch the disseisee, and he vouch the common vouchee; this is a good recovery.

Prerogative.

That it be in such a case as is not prohibited by some statute law: for if the king give any of his own land whereof he is seised, or cause or procure another in consideration of money or other land to give the lands whereof he is seised, in tail to any of his subjects or servants in recompence of their service, or the like, the remainder to the king in fee simple, or fee tail; such estates in tail cannot be barred by a common recovery: And therefore if such a tenant in tail shall suffer a recovery of such land it is void, and it will neither bar the issues in tail, nor any of them in remainder, nor the king (r). But if the king make such a gift

Stat. 34 H. 8.
c. 20. Co.
super Lit. 371.
251. 6 Co. & 77.
78.

necessary parties in making the tenant to the *precipe* for the new recovery: Therefore if the former recovery was bad from the circumstance of the deed making the tenant to the *precipe* being defective in point of form or substance, as where the tenant to the *precipe* was made by bargain and sale and it was void for want of enrolment; or by a feoffment, which was bad for want of livery; or by a release, which was bad for want of an estate capable of enlargement; (and where the instruments could not operate in any other mode); in all these cases the concurrence of the former tenant to the *precipe*, in suffering a new recovery, will not be necessary, since he in fact never had an estate of freehold. But where the conveyance is good, but the recovery is absolutely void *ab initio*, and not merely voidable, *there* the old tenant to the *precipe* either ought to be the tenant in suffering the new recovery, or he should convey to the person who is; unless uses have been declared so as to transfer the estate of freehold to the persons in whose favour they were declared; in which case they, or those claiming under them, must make the tenant to the *precipe* for suffering the new recovery; and if the old recovery was merely voidable, and has not been avoided, *there* the recoverer in the old recovery ought either to be the tenant to the *precipe* in the new one or convey to such tenant to the *precipe*, unless uses have been declared so as to transfer the estate of freehold from the recoverer; in which case the persons in whose favour the uses were declared, or those claiming under them, should either be, or should make, the new tenant to the *precipe*.

This may be a proper place to notice, that in favor of purchasers for a valuable consideration, the act of the 14 Geo. 2. c. 20. s. 4, enacts, "that where any person hath purchased, or shall purchase, *for a valuable consideration*, any estate in lands, tenements, or hereditaments, whereof a recovery or recoveries is, are, or were necessary to be suffered in order to complete the title, such person and persons, and all claiming under him, her, or them, having been in possession of the purchased estate or estates, from the time of such purchase, shall and may, *after the end of twenty years from the time of such purchase*, produce in evidence the deed or deeds, making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or common recoveries, and declaring the uses of a recovery or recoveries, and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts of law and equity, be deemed and taken as good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her, or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, *in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record*: provided always, that the person or persons making such deed or deeds as aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries."

(r) It may be proper to consider somewhat more fully in what cases the act of the 34 and 35 Hen. 8. c. 20. prohibits the suffering of a recovery. The preamble to this act recites, that the king, and divers of his progenitors, had given and granted, or otherwise provided, to his subjects, manors, lands, &c. to them, and the heirs male, or heirs of their bodies; to the intent, that the recompence for the service of the donees should not only be a benefit to themselves, but a continual advantage to the heirs of their bodies; and after reciting that such donees and their heirs in tail suffered feigned recoveries, whereby it had become a question whether such recoveries of estates, whereof the remainder or reversion, at the time of suffering them, was in the king, should "after the death of the tenant in tail, bar the heirs in tail or not," the act declares, that "no such feigned recovery, to be had by the assent of parties, against any tenant in tail, of any lands, &c. whereof the reversion or remainder at the time of such recovery had, shall be in the king, shall bind or conclude the heirs in tail, whether

a gift in tail, keeping the reversion to himself, and after doth grant the reversion to another; in this case the tenant in

"ther any common voucher be had in any such feigned recovery or not; but that after the death of every such tenant in tail, against whom any such recovery shall be had, the heirs in tail may enter, have, and enjoy the lands, tenements, and hereditaments, so recovered, according to the form of the gift of entail; the said recovery or any other thing or things to be had, done, or suffered, by or against any such tenant in tail, to the contrary notwithstanding."

From the rules mentioned by Lord Coke to have been laid down by the judges in construing this act, it is to be collected, that to bring the case within it, the estate tail must be created, or procured to be created, by a person who is *actually king at the time of creating it*; and that the reversion, or a remainder in tail (a remainder for life or years, Lord Coke says, will not be sufficient), *must be actually in the crown at the time of suffering the recovery*. There are two other circumstances, which is presumed are also requisite, but which Lord Coke does not mention; (*viz.*) that the grant in tail must proceed from the king's bounty, and that it must be for *services done to the crown*;* for the preamble to the act clearly speaks only of *gifts*, and those too for *services*. And this opinion is not only countenanced by what appears to have been Lord Nottingham's opinion on the subject;† but a modern decision has held, that these circumstances are requisite.‡ Therefore, to bring the case within the act, there must be a concurrence, it is conceived, of the four following circumstances, (*viz.*) that the estate tail is granted, or procured to be granted, by a person who is actually king at the time of the grant; that the grant proceeds from the bounty of the crown; that it is in consideration of services; and that the reversion, or a remainder in tail, is in the crown at the time the recovery is suffered.—Where all these circumstances occur, it is evident that the tenant in tail cannot suffer a recovery.

I may here observe, that although the act only speaks of barring the entail by means of a common recovery, yet it is laid down in Lord Coke's rules, that a *fine* is equally within the meaning of the act, by reason of the words, "the recovery, or any other thing, done or suffered to the contrary, notwithstanding." It may be proper also to observe, that although the act appears to be confined to gifts in tail, made before the passing of the act, yet Lord Coke says, that it extends to gifts made subsequent to it.

In order to enable persons seised in tail *ex provisione coronæ* to alienate or settle the estates in fee, there have been instances formerly of the crown granting the reversion to some indifferent person in order that a recovery might be suffered. Since the crown, however, has been restrained from alienating its possessions in fee,§ this cannot be done; therefore to enable such a tenant in tail to dispose of his estate now, an act of parliament is necessary.

Besides the above noticed act of the 34 and 35 H. 8. there is another, which appears to have been intended to restrain certain tenants in tail from *levying fines* of their estates, or perhaps from barring the entail at all. The latter purpose, however, it certainly does not accomplish, and whether it accomplishes the former, appears to be doubted. The act alluded to is the 32 Hen. 8. ch. 36. which is explanatory of the statute of fines. This act, after declaring in what cases a fine shall bar an estate tail, provides (amongst other cases), that the act shall not extend to any fine, levied by any person, of any manors, &c. "given, granted, or assigned, to the person levying the same, or to any of his ancestors in tail, by virtue of any letters patent of the king, or any of his progenitors, or by virtue of any act of parliament, the reversion whereof, at the time of the fine levied, being in the crown; but that every such fine shall be of like force, as if the act had never been made."

There can be little doubt but it was the intention of this proviso to prohibit the levying of fines by the persons mentioned in it. The words, however, that they should be of like force as if the act had never been made, have been thought to leave them to the operation of the statute of fines;|| and therefore, in case that act enabled tenants in tail to levy fines without the aid of the explanatory act, then, that fines might be levied by the persons mentioned in the proviso. It does not appear that this point has ever been decided. But whether a person possessed of an estate tail, granted by letters patent, or by act of parliament, the reversion of which is in the crown, is restrained by the proviso from levying a fine or not, is of no great consequence; for it seems to be settled that he may suffer a recovery of it; and although the recovery will not affect the reversion in the crown, yet it will destroy the estate tail, and turn it into a base fee.¶ To enable the tenant in tail to alienate or

* Instead, indeed, of the latter circumstance being mentioned as requisite; in Lord Coke's rules the contrary seems to be laid down: For in the sixth rule, it is held, that if the king in consideration of money, &c. procures a subject to make a gift in tail to another of his subjects, for recompence of service, or other consideration, the remainder to the king in fee, that it is a good provision within the act.

† Lord Nottingham's MSS, cited Mr. Butler's notes, Co. Litt. (373 b.)

‡ Perkins v. Sewell, 1 Sir Wm. Blackst. Rep. 654. 4 Burr. 2223.

§ See the statute 1 Ann. ch. 7.

|| 4 Hen. 7. c. 4.

¶ Neal v. Wilding, 1 Wils. 373.

* P. 43.

in tail may suffer a recovery, and bar the estate tail and the reversion also (s). And where a subject by the king's provision doth make such a gift in tail, and then doth grant the remainder to the king for life or years only; in this case the estate tail, remainders, * and reversion also, may be barred by a common recovery. So in other cases where a subject doth make a gift in tail, the remainder to the king in fee; this estate tail may be barred by a common recovery. And therefore if there be tenant in tail, the remainder or reversion in fee to another, and he in remainder or reversion by deed indented and inrolled, doth bargain and sell his remainder or reversion in fee to the king; or if one covenant to stand seised to divers uses in tail, the remainder to the king in fee; in these cases the estates, and the reversion and remainders depending thereupon, may be barred by a recovery. So if a man make a gift in tail, the remainder in fee, and he in the remainder doth grant his remainder to another for life, the remainder to the king in fee on condition the estate shall be void upon the tender of £20, in this case the estate tail, and the reversion also, and condition thereupon, may be barred. So if the Duke of Lancaster had made a gift in tail, and the reversion had descended to the king; this estate tail might have been barred by a recovery. So if prince H. son of H. 7. had made a gift in tail, the remainder to H. 7. in fee, which remainder by the death of H. 7. had descended to H. 8. in this case the tenant in tail might have

settle the estate in fee simple, an act of parliament will be necessary in this case, as well as in cases affected by the above noticed act of the 34 and 35 of Hen. 8.

In all other cases of grants or conveyances in tail proceeding from the crown and where the reversion or a remainder is vested in the crown, the tenant in tail cannot affect the remainder or reversion. He cannot do so although the estate tail was granted in consideration of money paid to the crown; for it is fully settled that a fine or recovery will not divert or destroy any remainder or reversion which is vested in the king.*—Therefore, to enable such tenants in tail to alienate or settle the estate for more than a base fee, the aid of parliament will be necessary.

But though this will be the case it is conceived, wherever an estate tail in reality proceeds from the crown and a remainder or reversion continues in the crown, yet if a subject makes a settlement in tail and limits a remainder or reversion to the king, this will not prevent the tenant in tail from destroying the remainder or reversion; for such a limitation to the crown would be considered as a contrivance to create a perpetuity.

And if a person conveys his estate to the crown, to the intent that the crown should re-convey it in tail, but reserving the reversion to itself; even in this case the tenant in tail may destroy the reversion; for this likewise would be considered an attempt to create a perpetuity.† Therefore, in cases circumstanced as the two last, the tenant in tail by means of a recovery may acquire the absolute fee and alienate the estate.

(s) The moment the crown parts with the remainder or reversion in fee, the estates tail and other estates expectant thereon lose the protection of this statute against being barred. Com. Dig. Estates, b. 31; Co. Lit. 372 b. *Earl of Chesterfield's Case*, Hard. 409. So long, however, as the crown retains such remainder or reversion, neither the estate tail, the remainder, or reversion, or any estate carved out of such remainder or reversion, (Com. Dig. Estates, b. 31; 8 Co. 67; Co. Litt. 373, b.) can be affected by any act of the tenant in tail. By the act of the 1 Ann. c. 7, the crown is now prohibited from alienating its possessions (except in certain excepted cases) for more than three lives, or thirty-one years, and consequently a reversion in fee or remainder in the crown cannot be alienated now for a longer period by any other means than an act of parliament.

* *Neal v. Wilding*, 1 Wils. 272; and see Plowd. 553.

† See *Johnson v. The Earl of Derby*, 11 Mod. 304. 2 Show. 104.

Stat. 11 H. 7.
cap. 20. Co. 3.
38. 61. 59.

Stat. 14 Eliz.
c. 8. Co. 1. 15.
62. 10. 43. 45.
3. 6.

barred the estate tail by a recovery. And yet if the king make a gift in tail, the remainder in tail, or grant the reversion in tail; in these cases a common recovery may not be suffered to bar the intail, remainder, or reversion. And if the husband for the advancement of his wife in jointure, and the preferment of the heirs of their two bodies, make an estate tail to him and his wife and the heirs of their two bodies, and the wife after her husband's death alone by herself, or with any other husband, suffer a common recovery of the land whereof this estate is made this recovery will not bar the estate tail. But if in this case the recovery be suffered by the heir in tail, or by the heir and his mother together, it is a good recovery. And therefore if A. be seised of land in fee, and he make a feoffment in fee, to the intent that the feoffee shall reconvey it to him and his wife and the heirs males of his body; and this is done accordingly, and they have issue a son, and she surrender, or make a forfeiture, and he enter and suffer a recovery; this is a good recovery, and bar to the estate tail: or if the writ be brought against the mother and she vouch the heir in tail, and so a recovery is had, this recovery will bar the estate tail (t). And howsoever at the common law a recovery against a tenant for life with a voucher upon a lawful warranty and a recovery in value, was a bar to him in remainder or reversion, and there was no remedy in this case, yet at this day it is otherwise (u). And therefore if tenant in tail after possibility of issue extinct, tenant by the courtesy, or any other tenant for life, do suffer their lands to be recovered from them by *cavin and agreement, either as immediate tenants or as vouches upon feigned titles, without the assent, and to the prejudice of him in remainder or reversion; such recoveries are void, and will not bar the remainders or reversions, but are forfeitures of the estates of such tenants for life. Inasmuch that if tenant for life be made tenant in fact to the writ, or tenant in law upon the voucher, and so a recovery be had; as if tenant for life make a lease for years, and the lessee for years doth make a feoffment in fee, and the feoffee doth suffer a common recovery in which the tenant for life is vouched, and he vouched the common vouchee; these recoveries will not bind the reversions or

* P. 44.

Forfeiture.

(t) Nor can a woman seised in tail by the provision of her husband or any of his ancestors or by his or their procurement (stat. Hen. 7. c. 20.), bar the estate tail, or the reversion or remainder, after the death of her husband, without the concurrence of the person next in remainder or next inheritable; but see further on this subject, supra, p. 38, note (g).

(u) If tenant for life suffers a recovery without the concurrence of the person in remainder or reversion, such recovery will work a forfeiture of his life estate in the same way as if he had levied a fee or made a feoffment in fee; but if such tenant for life has an estate tail in remainder after prior estate no forfeiture will be incurred. See *Smith v. Clifford*, 1 T. R. 788.

If a copyholder for life suffers a recovery by plaintiff in the lord's court, this has been held to be a forfeiture. See *Kerne v. Kirby*, 1 Mod. 199. 2 Mod. 32.

If tenant for life suffers a recovery, though he afterwards reverses it by a writ of error, the forfeiture still remains. *Skin*, 74.

See distinction between recovery suffered against tenant for life upon the ground of its being suffered with or without his consent; and its different operation in those cases as to remainder-men and reversionsers, Co. Lit. 362 a; and further as to recovery against tenant for life. Wils. 274.

remainders.

remainders. But there is no provision made at this day to preserve the reversion or remainder expectant upon an estate tail, nor to avoid a recovery of the tenant for life, where he in the next remainder is agreeing and assenting to it. And therefore if there be tenant for life, the remainder to *A.* in tail, the remainder to *B.* in tail, &c. with divers remainders over; and the tenant for life doth suffer a common recovery, in which he doth vouch *A.* who doth vouch the common vouchee; in this case this is a good recovery and doth bar the estate tail, the remainders, and reversion also. And if one be seised of land in fee and have two sons, *A.* by his first wife, and *B.* and a daughter by his second wife, and he devise the land to his wife for her life, the remainder to *B.* his son in tail; and the reversion of the fee descend to *A.* and the writ of entry is brought against the tenant for life, and she vouch *B.* and he doth vouch the common vouchee, and so a recovery is had without the assent of the heir in reversion; this is a good recovery and a bar to all the estates in possession, remainder, and reversion. And if a writ of entry be brought against the tenant for life, and he make default after default, and then the next in remainder in tail is received, or he pray in aid of him in reversion or remainder, and then they vouch over, and so a recovery is had; this is a good recovery and a bar to all the estates in remainder and reversion. But if the writ of entry be brought against the tenant for life and him in the remainder in tail together, and they vouch the common vouchee, and so a recovery is had; this will be no good recovery to bar the estate tail (y). ^a And if spiritual persons, as bishops, deans, parsons, and such like, suffer a recovery of their ecclesiastical lands; such a recovery is void and will not bind the successor. ^b But if it be not in some such prohibited case as before, and the recovery be had and suffered by and between such persons, and of such things, and in such a manner as aforesaid; in such cases, albeit there be in truth no warranty made upon which the voucher is had, and albeit there be nothing to be recovered in value, for that the vouchee hath no land to recover over in recompence, and albeit that no execution be done in the ^c life-time of the party against whom the recovery is had, yet is the same regularly a perpetual bar to the parties against whom the same is had and their heirs, of all the estates they have in fee simple, fee tail, or for life in them, and against all them in remainder or reversion, and the remainders and reversions that are depending upon their estates: with this difference, the recovery with the single voucher doth not bar any estate but such as the tenant in tail hath in

^a P. 45.

^a See before in Fines, and Co. super Lit. 44.

^b Plow. Maner's case. Co. 10. 373. 1. 94. Plow. 356.

Co. 3. 59. 1. Bro. sect. 323.

(y) If the writ of entry is brought against the tenant of the freehold and a stranger, the recovery will be good; for the recompence in value will go to the person who has really lost the estate. 1 Vent 358. *Paulin v. Hardy*, Skinn. 3. 63. Sh. T. 41.

If either a tenant for life or a stranger is jointly vouched with the tenant in tail, the recovery (though it was formerly held otherwise) will be a bar to the estate tail. See *Eare v. Snow*, Plow. 514. 18 Vin. Abr. 214. *Page v. Hayward*, Pig. 176. 2 Salk. 370. Rep. Temp. Holt, 618.

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Plow. Manx-
ell's case.
11 Ed. 4. 12.
13 Ed. 4. 1.

9 Co. 3. 5. 10.
37.

4 Co. 1. 135.
136. 3. 59.
11 E. 4. 19.
13 E. 4. Co.
10. 45.

possession at the time of the recovery had, so that if the tenant in tail be in any other estate, as by disseisin, or the conveyance of the disseisor, or the like, this estate is not barred: but the recovery with the double voucher doth bind and bar all interests, estates, and titles that the vouchee hath at the time of the entry into the warranty (z). All which is further illustrated by the examples following. ' If the writ of entry be brought against the tenant in tail, and he vouch the common vouchee, and so a recovery is had; this recovery with a single voucher is a good recovery and a bar to the estate tail, if it be then in possession and not put to a right, and to all the remainders and reversions depending thereupon. ' So if lands be given to A. in tail, the remainder to the right heirs of B. (B. being then living) and the writ of entry is brought against the tenant in tail, and he doth vouch over the common vouchee; this is a good recovery, and a bar to the estate tail and the remainder also. But if the tenant in tail be disseised, and then suffer a recovery with a single voucher; or the disseisor make a new estate in tail to the tenant in tail, and then the tenant in tail doth suffer a recovery with a single voucher; or if the tenant in tail make a feoffment in fee of

(z) In recoveries suffered to bar estates tail voucher is essential. It is the recompence in value which the issue in tail are supposed to be entitled to receive from the vouchee which is the ground or cause of the recovery barring the issue in tail. Fig. 31. Co. Litt. 375 a. As to the remaindermen indeed, the recompence in value is said not to be considered the cause of the bar. Against them a recovery is considered rather as a common assurance. Per Willes, 1 Wils. Rep. 73. But see *supra*, page 38, note (b). Though voucher is necessary in order to give a recovery the operation of barring an estate tail, yet where it merely operates by *estoppel* voucher is not essential; as where a recovery is suffered of an estate of which the party is seised in fee.

The recompence in value always goes to the persons by whom the loss is sustained. Therefore, if a stranger is vouched jointly with the issue in tail the recompence will belong solely to the tenant in tail and the recovery will be good (though the contrary was once held) notwithstanding the stranger was vouched. See *Page v. Hayward*, 2 Salk. 370. Fig. 176.

A recovery with single voucher is now rarely used. In such a recovery, the writ is brought against the tenant in tail himself, and is sufficient where he is seised of an estate tail in possession. But it will not bar any estate tail which is devested or discontinued. *Taltarum's case*. The safest course is always to suffer recoveries with double and treble vouchers. In recoveries with double voucher, the *precipe*, instead of being brought against the tenant in tail, is brought against some third person in whom the immediate freehold is vested, and it is usually vested in such person for the express purpose of making him tenant to the *precipe*. Where a recovery is suffered in which the tenant in tail is vouched, and vouchers over, (or in other words a recovery with double voucher) it will not only bar an actual estate tail of which he is seised, but it will bar all estates tail which have been discontinued, devested, or previously aliened. *Buxton v. Laver*, Cro. Eliz. 388. 1 Ves. 253. It will also bar all remainders and reversions expectant thereon, even though the estate tail has been previously barred by a fine with proclamations levied by the tenant in tail. *Sheffield v. Ratcliffe*, 2 Roll. Rep. 418. And it appears to be the received opinion, that a recovery by the issue in tail suffered after the death of his ancestor, who had barred the estate tail by a fine with proclamations, will bar all remainders and reversions which are expectant on such estate tail. *Ferne's Posth. Works*, 442.

Recoveries are sometimes suffered with treble voucher. The only possible case however in which a recovery with treble voucher would seem to be necessary, is, where a tenant in tail creates an estate derived out of his own estate tail, and the two entails are existing at one and the same time in distinct persons, and the intention is that both should be barred; here both tenants in tail must be vouched. Where however the intention is that the derivative estate tail should not be barred, then it will be improper to vouch the owner of it. And if the owner of the original estate tail is only vouched the derivative estate tail instead of being destroyed, will be affirmed. It is said, that when one estate tail is derived out of another estate tail, and both estates tail meet in the same person, that a recovery in which such person is vouched and vouchers over the common vouchee will bar both estates tail. *Manxell's case*, 2 Plowd. 8 b. 3 Co. 6. It is not, however, so easy to suppose how two estates tail, one derived out of the other, can subsist in one and the same person at one and the same time.

land,

land, and then take back a new estate to himself from the discontinnee in tail or in fee, and then doth suffer a common recovery with a single voucher; by this recovery the intail is not barred; but by a recovery with a double voucher in these cases the estate tail is barred. And therefore as where the tenant in tail doth levy a fine, make a feoffment, or bargain and sell the land by deed indented and inrolled, and the writ is brought against the conusee, feoffee, or bargainee, and he doth vouch the tenant in tail, and he doth vouch the common vouchee; this doth bar the estate tail and the remainders and reversion depending thereupon: So if in these cases the conusee, feoffee, or bargainee, doth make a new estate in tail to the consor, feoffor, or bargainor, or he disseise the conusee, feoffee, or bargainee, and then levy a fine, make a feoffment, or bargain and sell to another against whom the writ of entry is brought, and he vouch the tenant in tail, and he doth vouch the common vouchee; by this recovery the first and second estate tail and all the remainders and reversions depending thereupon are barred. So if lands be given to *I. S.* and the heirs males of the body * of his wife engendered, and he hath issue a son, and after his wife dieth, and he discontinue, and take an estate to him and the heirs females of the body of his second wife, and after discontinue again, and take an estate to him and the heirs females of his own body, and after discontinue again, and the writ of entry is brought against the last discontinue, and he doth vouch the tenant in tail, who doth enter into the warranty generally, and voucheth the common vouchee; this is a good recovery and a bar to all the estates in tail, and the remainders and reversions also. And if *A.* before the statute of uses had been tenant in tail, and had made a feoffment in fee to *B.* and he and *B.* had after made a feoffment to *C.* to the use of *A.* and his wife and the heirs of their two bodies, and then she had died, and after *A.* had entered upon *C.* the feoffee, and made a feoffment to *W.* in fee, against whom *I. S.* had brought a writ of entry, and he had vouched *A.* the tenant in tail; this had been a good recovery, and a bar to all the estates. And if the lands be given to husband and wife and the heirs of the body of the husband, with remainders over to strangers, and the husband alone doth discontinue the whole land by fine, feoffment, or bargain and sale indented and inrolled, and the writ of entry is brought against the discontinnee and he doth vouch the husband alone without the wife, and the husband doth vouch the common vouchee, and so a recovery is had; this is a good recovery for the whole land, and a bar to all the estates in tail, and remainder, and reversion, but not to the estate of the wife for her life after the husband's death. But if lands be given to the husband and wife and the heirs of their two bodies, with remainders over to strangers, and the husband alone discontinue, and the recovery is suffered as in the last case; it seems this is no bar to the estates in tail, or remainder,

Co. 3. 5. Plow.
in Manxel's
case, 1. 8.

Co. 3. 5. & 30

• P. 46.

mainder, or reversion, for any part of the land (a). And yet if lands be given to *I. S.* and *I. D.* in tail, and *I. S.* discontinue the whole, and the writ of entry is brought against the discontinuee; and he vouch *I. S.* alone; this is a good recovery for the one half of the land, and a bar to all the estates. And if lands be given as before, to husband and wife, and the heirs of their two bodies, and the writ of entry is brought against them both, and they vouch the common vouchee, or the husband alone doth discontinue, and the writ is brought against the discontinuee, and he vouch the husband and wife both, and they enter into the warranty, and vouch the common vouchee and so the recovery is had; these are good recoveries for the whole, and a bar to all the estates in tail, and to the estate of the woman, and to all other estates. And where lands are given to a man and his wife and the heirs of the body of the wife; or to the wife and the heirs of her body, and the writ of entry is brought against the husband and wife, and they vouch the common vouchee; these are good recoveries and will bar the husbands and wives, and the estates in tail, remainder, and reversion. And where a man hath land in which his wife hath a jointure, or to which she will have title of dower after his death, if the writ of entry in this case be brought against them both, and they vouch the common vouchee, and so a recovery is had, this recovery will bar them both (b): But the husband alone without her cannot bar her of any such estate by a recovery, for she may falsify and avoid it after his death. And if lands be given to husband and wife and the heirs of the body of the husband, and the writ of entry is brought against the husband alone, and he vouch the common vouchee, and so a recovery is had with a single voucher; this is no good recovery for any part of the land, nor bar to any of the

Husband and wife.

Bro. 37.

* P. 47.

Plow. 514.

Co. 3. 5. 1.
12 Ed. 4. 14.

(a) By the statute 32 Hen. 8. c. 28. s. 6, it is enacted, that no feoffment, fine, &c. by the husband only, of any manors, &c. being the inheritance or freehold of the wife, during the coverture, between them, shall in anywise be or make a discontinuance thereof, or be prejudicial or hurtful to the said wife or her heirs, but that the said wife or her heirs shall lawfully enter into any such manors, &c. any such fine, feoffment, &c. to the contrary notwithstanding, fines levied by the husband and wife whereunto the said wife is a party or privy only excepted.

This act has been construed liberally; so that where lands were given to the husband and wife and the heirs of their two bodies and the husband alone levied a fine thereof, the entry of the wife was adjudged to be lawful, although the words of the act are, "being the inheritance or freehold of the wife," whereas the lands were in this case as well the inheritance and freehold of the husband as of the wife. See vol. 1. 176, and post, 254, and also Saunders on Uses, 168.

Where husband and wife are joint purchasers in tail, remainder to the wife in fee, and the husband alone levies a fine and dies, this is an alienation within the statute.

If the wife dies before entry, her issue may enter (Qu. unless she survives her husband), and if she has no issue the person in remainder or reversion may enter by the express words of the statute.

This statute does not extend to copyholds, for the words of it only apply to estates which pass by common law assurances; and if it were construed to comprise copyholds the heir of the wife would become tenant without being admitted by the lord. Moor, 596.

(b) A recovery may be used for the purpose of barring a jointure, a title of dower, or conveying the estate of a married woman (2 Co. 74. 78. 10 Co. 43. *Ears v. Snow*, Plowd. 504. 514. Fig. 67. *Incliden v. Northcote*, 3 Atk. 430). But it is not usual to use it for any of the above purposes, unless its principal object is to bar an estate tail. It may also operate as a conveyance by a person who is seized in fee. See 3 Co. 5. Fig. 123. *Webb v. Hill*, Cro. Eliz. 21. *Lockyer v. Palfreman*, Style, 309, and Fig. 198.

estates,

estates, albeit the husband do survive the wife. And yet if lands be given to two others, and the heirs of the body of one of them, the remainder over to a stranger, and the writ of entry is brought against one of them, and he vouch the common vouchee, and so a recovery is had; this is a good recovery, and a bar to all the estates for the one half of the land. If lands be given to *A.* in tail, the remainder to *B.* in tail, the remainder to *C.* in tail, the remainder to *D.* in fee, and *A.* doth make a feoffment in fee, and the writ of entry is brought against the feoffee, and he doth vouch *B.* (being him in the second remainder in tail) to warranty, and he doth vouch the common vouchee; this is a good recovery, and a bar to the second estate tail and all the remainders and reversion depending thereupon; and yet it is no bar of the first estate tail which *A.* hath. If the writ of entry be brought against a mortgagee, and he doth vouch the common vouchee, and so a recovery is had; this is no good recovery to bar or bind the mortgagor, but that he may enter upon the condition broken. So if one give lands to *B.* and his heirs, so long as *C.* shall have heirs of his body, and *B.* doth suffer a common recovery, and vouch the common vouchee; this is no good recovery to bar the donor of the possibility, for in both these cases he that is to be barred hath no remainder or reversion, but an interest or possibility which cannot receive a recompence in value. But if in these cases the mortgagee vouch to warranty the mortgagor, or *B.* the donee vouch the donor, and so they vouch over the common vouchee, and so the recovery is had; these will be good recoveries to bar both them and their heirs for ever. And if one have an estate in fee-simple determinable on a limitation or a condition, as if lands be given to *A.* and his heirs until *B.* pay to him £100, and then it shall remain to *B.* and his heirs, and *A.* in this case doth suffer a common recovery and vouch the common vouchee; it seems this is no bar to *B.* and his heirs, but that upon payment of the £100 he shall have the land. So if *one by his will devise his land thus, I give unto *A.* my son and his heirs for ever my land in *W.* paying £20 to *B.* when *A.* shall come to twenty-one years of age, and then that *A.* and his heirs shall have it for ever, and if *A.* shall die without heirs of his body, *C.* being then living, that then *C.* shall have it to him and his heirs for ever, and *A.* pay the £20 to *B.* at his full age, and then suffer a recovery of the land, this is no bar to *C.* of his estate. But here it must be noted, that in the cases before, where it is said that a recovery is void, it is meant as to the heirs and them in reversion and remainder, for as to the parties themselves that do suffer the recovery the same is for the most part good, and doth bind them by way of estoppel and conclusion. And it must be noted also that a stranger, that hath right to the land at the time of the recovery suffered, is not barred at all by the recovery or by his laches of *non-claim*, &c. as in the case of a fine.

Co. 2. 6.

Curia, Ric.
18 Jac. B. R.
So was it held
by most of the
Judges in the
case between
Pell and
Browne.

• P. 48.

Co. 3. 6.

The

Stat. 7 H. 8.
c. 4. Dyer 31.
Co. super Lit.
104.

The recoverors in common recoveries their heirs and assigns shall have the like remedy against lessees for lives or years of the land recovered, their executors or assigns, by distress, avowry, or action of debt, for the rents and services reserved upon their leases that shall be due after the same recoveries had: And also like actions for waste done after the recovery had: And like remedy upon a disturbance in a presentation to an advowson, and in like manner and form as the lessor should or might have had if the same recoveries had never been had, albeit the same lessees do never attorn to the same recoverors. And if a man make a lease for years to begin at Michaelmas reserving rent, and before Michaelmas he suffer a recovery; in this case the recoveror shall distrain for this rent, which the lessor before the recovery could not distrain for. But if the recovery had not been had he might have distrained.

6. The remedy of recoverors against the lessees for rents and services, and upon waste done.

Stat. 23 El.
cap. 3. Co. 5.
40. 21 H. 8.
cap. 15. Co.
super Lit. 46.
104. Co. 3. 78.
Dyer 249.
Co. 3. 4. 1. 62.
Plow. 315.

A recovery may be defeated, frustrated and avoided (which is called the falsifying of a recovery) in part, or in all, for many causes; as for that there is some gross and substantial error in the manner of the proceeding; but a recovery is not avoidable for false or incongruous latin, rasure, interlining, mis-entering of any warrant of attorney, mis-returning or not returning of the sheriff, or other want of form in words, and not in matter of substance, because it is done by the consent of the parties. Or it may be avoided, for that he against whom the writ of entry is brought is not tenant of the freehold by right or wrong at the time of the writ brought, as when the writ is brought against a stranger that hath nothing in the land, and he doth vouch the tenant in tail in possession of the land. Or a recovery may be avoided, for that he that hath the estate and the right is neither party nor privy to the recovery, as when the writ of entry is brought against a disseisor, and he vouch a stranger that hath nothing in the land, or a recovery is had against * the husband alone of the land whereunto his wife hath title of dower. Or a recovery may be avoided, for that another hath some estate in the thing whereof the recovery is had at the time of the recovery suffered, as when there is a recovery had of land whereof there is a lease or estate for years, by statute, elegit, or the like. Or it may be avoided, for that the recovery is had by covin, as when it is suffered by tenant for life to disinherit him in reversion, or when it is gotten by some undue practice and minister dealing; for in this case it is sometimes made void by a *vacat* or a sentence of a court. And where a recovery is avoidable or reversable for any of these or such other like causes, it must be avoided by him whom it doth concern, that is barred and bound by the same recovery, that should have had the land if the same recovery had not been, and not by any other whom it doth not concern. As if an erroneous recovery be suffered by tenant in tail, in this case his issues, or if they fail, the next in remainder or reversion shall defeat it. So also if the land be recovered against a stranger, the tenant in tail shall avoid

7. Where a recovery may be avoided; or not; and by whom; and how.

Fauxrifer de recovery

* P. 49.

it: And if the land be recovered against him in reversion or remainder, the tenant for years by statute or elegit shall avoid it; but in these last cases they shall falsify and avoid it during their particular estates only. So also the wife shall falsify the recovery suffered by her husband alone as to her title of dower only, and no longer and further. And he in the reversion or remainder shall falsify and avoid the recovery suffered by the tenant for life, either in the life-time of the tenant, or afterwards. But neither he in reversion or remainder, or any one by or under him, or any other, can falsify a recovery suffered by the tenant in tail in possession, except it be for some such causes as before. And the recoveror himself cannot falsify a recovery. So neither can a guardian; nor a tenant of a manor; as if one hold land of a manor, and a stranger recover the manor by a feigned title; a tenant of the manor cannot falsify this recovery. And in all these cases where a recovery is avoidable and a man hath power given him to falsify, he must do the same sometimes by writ of error, as in the case of an erroneous proceeding; and sometimes by pleading and the setting forth of the special matter, as in the case where the tenant of the freehold, or when the recovery is had by covin against the tenant for life, or the like; and sometimes by the shewing and setting forth of the practice to the court, and a motion made that a *vacat* may be made upon the judgment for the causes alledged (f).

And

(f) The judgment obtained in a common recovery can only be reversed by a writ of error, which must be brought in the Court of King's Bench, unless the error is in the process, in which case the recovery may be reversed in the Court of Common Pleas. By the statute 34 & 35 Hen. 8. c. 26. s. 113. it is enacted, that all judgments given at the great sessions in Wales shall be redressed by writ of error returnable in the Court of King's Bench in England.

No person has a right to bring a writ of error for the purpose of reversing a common recovery, unless he has an immediate interest in the lands whereof the recovery has been suffered. *Ann. 5 Mod. 396.*

The right to bring a writ of error descends to the person to whom the lands would have descended in case the recovery had not been suffered. See *Henningham v. Windham*, 1 Lech. 261. In case of an attainder for high treason the right of bringing a writ of error to reverse a common recovery does not pass to the crown. *Marquess of Winchester's case*, 3 Rep. 1. The error assigned in a recovery may either be in fact or in law; but nothing can be assigned for error which contradicts the record. It follows from this principle, that no incapacity in the vouchee can be assigned for error where he appears in person; but if a vouchee appears by attorney an averment may then be made, either that such vouchee died before judgment was given, or that he laboured under some personal disability which rendered him incapable of suffering a common recovery. See 1 Wils. 42. *Holland v. Deane*, Cro. Eliz. 739. *Stokes v. Oliver*, 5 Mod. 209.

A release of errors from the common vouchee cannot be pleaded in bar of a writ of error to reverse a common recovery. *Lord Norrice v. The Marquess of Winchester*, Cro. Eliz. 2.

By the statute 10 and 11 Wm. c. 4. it is enacted, that no fine or common recovery, &c. shall be reversed or avoided for any error or defect therein, unless the writ of error, or suit for reversing of such fine, recovery, &c. be commenced or brought and prosecuted with effect, within twenty years after such fine levied or recovery suffered. The second section provides "that if any person who shall be entitled to any such writ of error as aforesaid, shall, at the time of such title accrued, be within the age of twenty-one years, or covert, non compos mentis, imprisoned, or beyond the seas, then such person, his or her heirs, executors or administrators, (notwithstanding the said twenty years expired), shall and may bring his, her, or their, writ of error for the reversing of any such fine, common recovery, &c. as he, she, or they, might have brought if this act had not been made, so as the same be done within five years after his or her full age, discovery, coming of sound mind, enlargement out of prison, or returning from beyond the seas, or death, but not afterwards, or otherwise."

Where a recovery is suffered of lands held in ancient demesne, it must be reversed by a writ of *deceit*. *Rex v. Firebrace*, Barnes, 258.

A common

And thus having done with the common assurances that are made* by matter of record (g), we come to the common assurances * P. 60.

A common recovery suffered in a copyhold court can only be reversed by petition to the lord in the nature of a writ of false judgment. *Smith v. The Dean and Chapter of St. Paul's and Lewis Rugle*. Show. Cases in Parl. 67. 1 Vern. 367.

An erroneous recovery is good till it is reversed, C. 229. Although a common recovery can only be reversed by the Court of Common Pleas in the first instance, and by the Court of King's Bench upon a writ of error from the Court of Common Pleas, yet the Court of Chancery can, in fact, invalidate a common recovery, where it appears to have been obtained by fraud or imposition, by compelling the recoveror, or the parties taking under the declaration of uses, to convey the estate to the person who is entitled in equity to have it; or by declaring the recoveror to be a trustee for such person. *Ferris v. Ferris*, 2 Abr. Eq. 695.

A court of equity will also restrain the operation of a recovery to those purposes for which it was intended, and will not allow it to have a more extensive effect. *Stanhope v. Thacker*, Prec. in Ch. 435.

It may be proper to observe, that it is not for every error that a common recovery will be reversed, for common recoveries being considered as common assurances they are always favourably construed in order to effectuate the intentions of the parties. Therefore where an evident mistake has been made in the names or descriptions of the parties the court allows the recovery to be amended. *Chapman v. Bacon*, Pig. 170. *Thurber v. Pandy*, Pig. 171. *Mayor v. Coulthard*, 2 Blackst. Rep. 1250. *Lord v. Biscow*, Barnes, 24. So where a mistake has been made in the description of the estate intended to be comprised in the recovery the recovery will be amended. *Skinner v. Lord*, Pig. 171. *Whitwell v. Masters*, Pig. 172. *Brook v. Biddolph*, ibid. But the court will not amend the parcels in a recovery, unless it appears on the face of the deed making the tenant to the precept that the intention was to include such parcels. See H. Blackst. Rep. 72. Amendments are also allowed in the writ of seisin and the return thereof. See *Wilton v. Fairfax*, Barnes, 23. *Watson v. Lockley*, 2 Wils. Rep. 2.

(g) A few other points on common recoveries may be noticed here.

A recovery by tenant in tail after attainder for treason will not bar the remainders, Jenk. 251.

Idiot and lunatics are not competent to suffer common recoveries, though if an idiot or lunatic does suffer one and is vouched in person no averment can afterwards be made that he was an idiot or lunatic. But if he is vouched by attorney, evidence of his incapacity would, it is presumed, be received and the recovery defeated; and evidence of incapacity will be admitted to invalidate the deed making the tenant to the precept, and by that means the recovery may be defeated. *Sir B. Wentworth's case*, Cru. on Rec. 186. and *Hume v. Burton*, ib. 361.

If a tenant in tail is disseised and releases to the disseisor he may nevertheless suffer a common recovery which will bar the estate tail and the remainders and reversion.

The owner of a contingent or executory interest in tail cannot, it is conceived, by a common recovery bar either his own interest (except by way of estoppel) or the remainders or reversion expectant thereon; nor can the issue in tail suffer a common recovery in the life of his ancestor. *Appress v. Appress*, Bendloes, cited 1 Keb. 391. A tenant in tail after possibility of issue extinct cannot suffer a recovery, p. 144. But a tenant in tail who has levied a fine and barred the estate tail may still suffer a recovery and bar the remainders and reversion, Cr. 226. And it is the understood opinion of the profession, that the issue in tail after a fine by his ancestor may also bar the remainders and reversion by means of a recovery, ib. 227.

Where several persons are tenants in common or joint-tenants in tail and only some of them are touched, the recovery will be good only for their shares; or where husband and wife are tenants in tail by entirety, neither of them alone can bar the estate tail by means of a recovery (3 Co. 5.) as to prejudice the other of them, or bar the issue in tail, or those in remainder or reversion. *Common's case*, 9 Co. 139. Hob., 257.) But when husband and wife are tenants in tail by joint-titles, (that is, where they had an estate to them, and the heirs of their bodies before their marriage,) either of them alone before the marriage, or the husband alone after the marriage, may suffer common recovery and bar the estate tail in his or her moiety.

If a tenant in tail by purchase under a marriage settlement made by his ancestor *ex parte maternâ*, and the reversion in fee by descent *ex parte maternâ*, suffers a common recovery to the use of himself in fee, the fee acquired by the recovery will descend to his heirs *ex parte paternâ*. But if he suffers the estate by descent *ex parte maternâ*, and suffers a recovery to the use of himself in fee, the fee will descend to his heirs *ex parte maternâ*. See *Martin, ex dem. Tregonwell v. Strachan*, 1 Stra. 13. 1 Wils. Rep. 66. 5 T. R. 107. note. And it is the same as to copyholds. See *Roe v. Baldwere*, 1 R. 104. though query of this case.

A common recovery operates as a revocation of a prior devise of the lands whereof the recovery is suffered; (*Dister v. Dister*, Lev. 3. 108. *Marwood v. Turner*, 3 P. Wms. 163.) unless the recovery is suffered for a particular purpose, in which case it shall operate as a revocation no further than to that purpose.

A common recovery suffered by a tenant in tail lets in all preceding incumbrances that he himself brought upon the estate and renders valid all the acts of ownership which he has exercised over and that whether such incumbrances are legal or equitable ones; though as to equitable ones they did not be good against a subsequent incumbrancer or purchaser without notice who gets the legal estate;

assurances that are made by matter of *fact*, viz. by deeds and instruments of writing in the country; wherein we must stay a while upon the learning of deeds in general, and from thence we shall descend to the particular kinds of deeds.

estate: 3 Atk. 376. And although a recovery be suffered for a particular purpose yet it will confirm all prior incumbrances. 1 Ch. Cas. 119.

An estate *pur autre vie*, or for lives, cannot be entailed within the statute *de donis*. *Low v. Barron*, 2 P. Wms. 262. Where such an estate is limited to a man and the heirs of his body such a limitation gives what is termed a *quasi entail*, which, with the limitations over, may be barred by alienation by fine, (*Wastneys v. Chapples*, 1 Bro. P. C. 457.) lease and release, (*Duke of Grafton v. Hammer*, 3 P. Wms. 266. note. *Norton v. Frecker*, 1 Atk. 524.) bargain and sale, grant or surrender, (*Baker v. Barley*, 2 Vern. 225. *Blake v. Blake*, 3 Cox's P. Wms. 10. note,) or in equity, by articles (*Wastneys v. Chapples*, supra.) And it would seem that it may also be barred by will. *Doe v. Lutton*, 6 T. R. 293.

As the doctrine relative to the uses of fines has been pretty fully treated of, and as the doctrine respecting the uses of recoveries is very similar to it it will not be necessary to do much more than to refer to what has been said on the former subject. See ante, page 37, note (n). It has been before noticed, that although uses cannot be declared on a bargain and sale, yet that the making of the tenant to the *præcipe* by bargain and sale does not prevent uses being declared of the recovery; for the uses in such a case are not derived out of the estate of the bargainee, but out of the estate of the recoveror.

CHAP. IV.

OF A DEED.

Tolls of the
law.
Co. super Lit.
35.

Terms of the
law.
Co. super
Lit. 229. 143.
28 H. 6. 25.

A DEED is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties, whose deed it is, to the things contained in the deed (*a*).

1. A deed.
Quid.

All deeds are either indented, or poll. The deed indented (which is that which is called an indenture) is when the paper or parchment is cut and indented. And it is defined to be a writing containing a conveyance, bargain, contract, covenants, or matter of agreement, between two or more; and is indented in the top or side answerable to another that likewise doth comprehend the self same matter. And this is so called because it is so indented; for albeit it be called an indenture, and begin in these words, *Hæc indentura*, &c. yet if it be not actually indented, it is no indenture. And on the other side, if it be not so called, or these words be omitted, yet if it be indented, it is an indenture. And this was anciently called *Charta chyrographata vel communis*, because each party had his part (*b*). The deed poll is that which is plain without any indenting, when the parchment or paper is polled or cut even. And this was anciently called *charta de una parte*. And this is single and but one, which the feoffee, grantee, or lessee, for the most part hath. The deed indented is also sometimes bipartite, i. e. of two parts, when there are two parties and two parts of the deed. And then commonly the feoffor, grantor, or lessor hath the one part, and the feoffee, grantee, or lessee, the other part. And sometimes it is tripartite, i. e. when there are three parties and three parts, and then commonly each party hath a part of the indenture. And sometimes it is quadripartite, &c. And according to the parts they do seal interchangeably one to another. And amongst these parts the part sealed by the feoffor, grantor, or lessor, is said to be the principal or original, and the rest are called but accessory, counterparts or copies; and yet all of them

2. Quotuplex.
Indenture.
Deed poll.

Counterparts.

(a) There are four kinds of common assurances by which lands may be conveyed. 1st. Deeds or *assurances in pais*, which are assurances between private persons made, according to the old common law, upon the very spot or piece of land to be transferred; and therefore termed deeds in *pais*, or in the country. 2dly. Matters of record, or assurances made in the King's courts of record. 3dly. Assurances deriving their effect from special custom prevailing in some particular places, and relating only to some particular species of property. 4thly. A devise contained in a man's last will and testament, which does not take effect until after his death.

(b) The cases in which an indenture is essentially necessary to the validity of the assurance are not numerous. In bargains and sales under the statute of Isorolments, 27 H. 8. c. 16. an indenture is necessary; and under the act of the 13 Eliz. c. 7. the conveyance by the commissioners under a commission of bankrupt of the bankrupt's real estate must be by deed indented. And where a power is required to be exercised by indenture, an indenture is, of course, necessary.

* P. 51.

in law do make up but one entire deed (c). These deeds also are sometimes * in the first person, as *Noveritis, &c.* me A. B. &c. *dedi & concessi, &c.* And albeit it be an indenture so made, yet it is good enough. And sometimes they are made in the third person, as *Hæc indentura testatur, &c. quod idem A. B. &c. dedit & concessit, &c.* † The deed poll is usually made in the first person; but if it be made in the third person it is good enough. There are divers other distinctions of deeds; for some are public that do concern countries, some of the prince. And some are private between particular persons, and those private persons or subjects. And these only are intended here. And of these some are absolute, and some conditional: some are inrolled, and some not inrolled: some concern the realty, and some the personalty: and some are mixt. And some of these also contain matter of grant, or gift; amongst which, feoffments, gifts, bargains and sales, grants, and leases are the chief. And some of them contain matter of discharge, as releases, acquittances, and defeasances, and such like. And some of them contain other matter, as confirmations, and such like. Or, as others distinguish, some of them are constitutive and making, and some are remissory or liberatory. And the first sort are, some of them creating, i. e. such whereby any estate, property, or obligation, not having essence before, is newly raised and created, as the first grant of a rent, common, way, &c. estate tail, for life, years, &c. And some of them are conveying, i. e. such by which estates, properties, and the like being already created, are conveyed to others, as feoffments, bargains and sales, grants over or assignments, surrenders and the like. Those that are of the last sort, are such as do describe and testify some precedent contract for a duty or fact, to be paid, performed or done, released or discharged; of which sort are all acquittances, releases, and other such like matters of discharge.

† Bro. Oblig.
51. Co. super
Lit. 35. 36.
West Symb.
lib. 1. part 1.
Sect. 22.

Notes.

But here by the way, two things are to be observed. See West. Sym. 1. part.
1. That there may be, and are, divers other kinds of deeds besides those which are named before; for every agreement put in writing, sealed and delivered, becometh a deed. And attornments, exchanges, surrenders, partitions, authorities, commissions, licences, revocations, and the like, are usually made, given, done and granted by deed. And there are divers other instruments concerning merchants and other affairs; if therefore any of these be done by deed, such a deed is for the most part subject to the rules of deeds herein laid down. 2. Albeit that feoffments, gifts, bargains, leases, attornments, exchanges, surrenders, and such like things, may in divers cases be as well made and done without as with a deed, yet if a man will

(c) It is usual for all the parties to execute each part of the deed, which renders each an original. But a counterpart of a deed which had been lost has been held to be sufficient evidence of such a deed having been executed, and a conveyance decreed accordingly. *Eyton v. Eyton*, Prec. in Ch. 116. Where, however, two parts of a deed of charter-party had been executed and one part had been lost, the Court of Common Pleas refused to compel the charterer to grant inspection and a copy of the other part. See *Street v. Broome*, 6 Taunt. Rep. 302.

make his claim to any thing given or granted by such feoffment, gift, &c. by deed, the deed must be such a deed as is a good and perfect deed by the rules hereinafter laid down.

Co. super.
Lit. 6. 229.
2. 3.

* In every deed or writing there are two parts considerable: 1. the external or material part; i. e. the parchment or paper, wax, and writing: 2. the internal or intellectual part; i. e. the sense, force, virtue and operation of the words and matter therein contained. And in the writing, context, or matter contained in divers deeds, as feoffments, grants, leases, and the like, there are certain formal or orderly parts, which make up the whole, of which the law doth take special notice; as, 1. The premises, the office whereof is to rightly set down the name of the feoffor, grantor, lessor, &c. feoffee, grantee, lessee, &c. (a) and to comprehend the certainty of the thing granted or leased. And herein in some deeds there is also a recital of some things and in some deeds an exception of some part of the thing granted before by the deed. 2. The *habendum*, the office whereof, is to name again the feoffee, lessee, &c. and to set forth what estate he shall have, and for what time he shall hold the thing given or granted. 3. There is set down and expressed upon what terms and conditions the estate of the thing granted shall be held. And therefore there is sometimes contained therein a *tenendum*, to set forth by what tenure the grantee shall hold the land granted (a). 4. A reservation or *redendum*, to set forth by what rent he shall hold the land. 5. A condition. 6. A warranty. 7. Covenants. 8. The conclusion after this manner, *In cujus rei testimonium*, &c. wherein is set forth the date of the deed, containing the day, month, and year, and the stile of the king or year of our Lord. And all these are sometimes contained under the premises and the *habendum*.

* P. 52.

3. The parts of a deed.

Plow. 134.
38 H. 6. 24.
25. Lit. Sect.
370. 9 H. 6.
35. 35 H. 6.
34.

All the parts of a deed indented in judgment of law do make up but one deed, and every part is of as great force as all the parts together, and they are esteemed the mutual deeds of either party, and either party may be bound by either part of the same. And the words of the indenture are the words of either party. And albeit they be spoken as the words of the one part only, yet they are not his words alone, but may be applied to the other party if they do more properly belong to him: for every word that is doubtful shall be applied and expounded to be spoken by him to whom they will best agree according to the intent of the parties; and they shall not be taken more strongly against one, or beneficially for the other, as the words of a deed

4. The nature of a deed indented, and a deed poll, with the difference that is between them.

(a) Where the name of the grantor has been omitted in the granting part, the court, by construction, has applied the omission. See *Tresham v. Elliston*, 2 Vent. 41. *Butler v. Elton*, 1 Cary's Rep. 132. *Giles v. Lambert*, Alleyn, 41. And where in the granting part, the name of the grantee has been omitted, but inserted in the *habendum*, the conveyance has been held to be good. See *Bustard v. Cocker*, Cro. Eliz. 903, &c.

(b) Before the statute of *quia emptores*, the *tenendum* was generally inserted to shew whether the lands were to be held of the grantor or of the superior lord; but as the lands since the statute can only be held of the superior lord the *tenendum* has become unnecessary so far as its purpose was to shew of whom the lands should be held; the *tenendum* too, was formerly used to signify the tenure by which

a deed poll shall. † If therefore A. by indenture enfeoff B. † 11 H. 7. 32. upon condition, and then doth enter for the condition broken; and in this case it hath been held, that A. in his pleading may shew forth the deed that he himself sealed, and that this is sufficient. And therefore also it is thought, that an indenture made in the first person, is as good in law, as an indenture made in the third person, when both parties * have to this put their seals; for if in an indenture made in the third person, or in the first person, mention be made, that the grantor only hath put his seal and not the grantee, then is the indenture only the deed of the grantor; but when mention is made that the grantee also hath put his seal to the indenture, it shall be said to be the deed of them both (f). per Brim.

* P. 53.

And although both parts of the indenture are but as one deed, yet the part of the grantor is as the principal, and the other is not but a counter-part (g). And therefore if the lessor only seal, and not the lessee, yet it is as good as if both had sealed; and if there be any difference between the parts the counter-part shall be made to agree with the principal, and it shall be deemed the misprision of the clerk. Lit. Sect. 373.

Estoppel.

This deed is the strongest kind of deed of the two; for this worketh an estoppel, i. e. doth bar and conclude either party to say or except any thing against any thing contained in it. For if a lease be by indenture, both parties are concluded to say, that the lessor had nothing (h) in the land at the time of the lease made; so that if the lessor happen to have the land after by purchase or descent, the lessee may enter upon him by way of conclusion, and the lessee by estoppel shall be forced to pay his rent. But it is otherwise of a deed poll, for this is commonly but of one part, which is sealed by the feoffor, lessor, &c. only. And this shall be expounded to be the sole deed of the feoffor, lessor, &c. and the words therein contained shall be said to be his words, and shall bind him only, and be expounded altogether in advantage of the feoffee, lessee, &c. and against the feoffor, lessor, &c. and this doth not work any estoppel against either party (i). But if a deed be in- Fioche's law, 109.

which the estate granted was to be holden; viz. *tenendum per servitium militare, in burgagio, in libero servicio, &c.*; but all these being reduced by the statute 13 Car. 2. c. 24. into free and common socage the tenure is now never specified.

(f) The indenture in the third person is the most sure, because it is most commonly used. Co. L. 329 b. And where a deed is made between two parties, and one of them seals and delivers a part and the other does not, yet the deed so sealed and delivered is good to charge the person sealing and delivering it. Cro. Eliz. 212.

(g) When there are several parts of an indenture, it is now frequent in practice for all the parties to execute every part, which renders them all equally originals or principals.

(h) But if the indenture operates in any degree to pass an interest it shall not take effect by estoppel. See Co. Lit. and Booth's Opinion printed Cases.

(i) *Sed quare* as to the feoffor and lessor. In Co. Litt. 47 b. it is said, if the lease be made by indenture then are both parties concluded; but if it be by deed poll the lessor shall not be estopped to say that the lessor had nothing at the time of the lease made; whereby it seems to be implied the lessor shall be estopped.—For a discussion of this point, see Bac. Abr. Leases (O), and the authorities there cited. On the ground of a deed poll being solely the deed of the feoffor, and expounded altogether in advantage of the feoffee it was formerly doubted, whether if A. by deed poll granted lands in fee to B. reserving a rent with a clause of distress, whether this clause was void and the rent a rent seck. But it is now held that it is good, for the feoffor's acceptance of a deed poll is sufficient to shew his assent to take the estate upon the terms contained in the deed. Salliv. Lect. p. 10.

Trin. 36 El.
Co. B. per
Curiam.
Co. super Lit.
143.

dented or poll, and there be therein reciprocal covenants between them from one to another, albeit there be but one part, yet if each of them seal it and deliver it the one to the other, this is good for both parties; and each of them, that can get the deed into his hand to shew or plead, may take advantage thereof against the other (k). And in this case the deed is usually kept by one indifferent between them both.

See Grant, infra.

Note here first of all, that some deeds are void from the beginning, and do never take effect; and amongst these some are absolutely void against all persons, and some are void only to some purposes, and against some persons. Some also that are not void from the beginning are, notwithstanding, voidable, and that sometimes by the party himself that made them, or any others, and sometimes by others, and not by himself. And some deeds are good in their first creation and well made at the first, but become void by some matter *ex post facto* (l). And this may be either by an extrajudicial act, as *rasure*, or the like; or by a judicial act, i. e. when by the sentence of a court a deed is *damm'd* and made void, which is called a *vacat* of the deed (m).

5. When and where a deed shall be said to be good and sufficient; and when and where not; but void or voidable *ab initio*.

* P. 54.
A *vacat* of a deed.

To

(k) So he may take advantage of it if he can give evidence of its contents; for a proferit is now held not to be necessary where the deed is averred to be in the hands of the other party, or to be lost.

(l) And some that at the time of making are voidable, may be made good by some after act; as a *seignior by husband and wife of the wife's land rendering rent, the husband dies, the wife accepts the rent, this shall bind her.* 2 Brownl. 141. *Punchoon v. Legate*, Cro. Eliz. 749.

Deeds may be avoided in different ways and for various reasons. Thus in the case of a deed poll, the grantee may disclaim the estate intended to be given to him. But in the case of an indenture, if the grantee executes it he thereby accepts the estate which is conveyed to him. It is said that a disclaimer of a freehold estate must be in a court of record, because a freehold shall not be devested by mere words *in pais*. See *Butler and Baker's case*, 3 Rep. 26. But terms of years may be disclaimed *in pais*, and by such disclaimer the interest will be devested. 3 Rep. 26 b. *Smith v. Wheeler*, 1 Vent. 130. And with respect to estates of freehold the usual practice, it is believed, now is to disclaim by deed *in pais*. See *Crews v. Dicken*, 4 Ves. 98.

Rasure or interlineation after the execution of a deed avoids it where it is altered in a material part. *Paget's case*, 11 Rep. 26. But an interlineation or addition to a deed where made before the delivery of the deed constitutes a part of the deed and is therefore good. And wherever there is a *rasure* or interlineation, such *rasure* or interlineation, it is apprehended, would be presumed to be made before the execution of the deed, unless there was proof to the contrary. In the case of *Fitzgerald v. Faulconberg*, (Fitz. R. 204.) an interlineation by which a power of sale was enlarged, was presumed to have been made at the time of the execution of the deed and not after, nothing appearing to the contrary. Where any *rasure* or interlineation however is made in a deed before it is executed, it is advisable to take notice of it in the attestation. In the case of *Paget v. Paget*, (2 Cha. Rep. 187.) blanks in a deed were filled up after its execution, and though the deed was not read again to the party nor re-executed, yet it was held to be good.

If the seal of a deed is torn off by accident, or destroyed by time, the deed will still be valid notwithstanding the old doctrine to the contrary. *Nichols v. Haywood*, Dyer, 59 a. and *Argol v. Cheryary*, Palm. 403. But if a bond or other instrument (except an instrument which actually transfers an interest in or issuing out of lands) is by the mutual consent of the parties cancelled by tearing off the seal, or otherwise defacing it, such instrument becomes void. But where an estate or interest in lands has actually passed by a deed, the cancelling of the deed will not devest the estate. *Hudson's case*, Pre. in Ch. 235. *Bolton v. Carlisle*, 2 H. Bla. Rep. 259.

(m) Although the Courts of common law have a jurisdiction in matters of fraud, and on the ground of fraud will set aside deeds, yet it has long been the practice to apply to a Court of equity for the purpose of avoiding deeds that have been fraudulently obtained; because a Court of equity will allow of arguments and admit of evidence which are not permitted in Courts of law. There are other cases as well as cases where positive fraud has been practised in which deeds and assignments will be set aside; but to enter fully into this subject, would exceed the limits of a note: It may not however be proper to take a brief or general view of it. *Ignorance* or *misapprehension of any particular fact* or *law* is a ground on which deeds are sometimes avoided; but if the fact or right is from its nature *obscure*, or was equally unknown to both parties at the time of the deed or agreement being executed, and, it would seem, there is no ground for the interposition of equity.

Inadequacy of consideration is also a ground on which deeds or agreements may be avoided. The inadequacy however must be considerable to induce the Court to interpose, (see Mr. Sugden's *Vendors and Purchasers*,

Things requisite to make a deed good.

To the making of every good deed containing any agreement, these things are requisite. 1. Writing: *i. e.* That it be written in parchment or paper; and that the agreement be legally and formally set down, and be sufficient in law for the composition and frame of the words. And this is called the legal part, the judgment whereof belongeth to the judges of the law. 2. That there be a person able to contract, and to be contracted with, and a thing to be contracted for, and that all these be set down by sufficient names (*n*). 3. Reading: *i. e.* That if it be an illiterate man that is to seal the deed, and he desire to hear it read, that it be truly read, or the contents thereof truly declared to him. 4. Sealing: *i. e.* That the deed so written, be sealed by the party or some other by his appointment (*o*), for a further testimony of his consent thereunto. 5. Delivery: *i. e.* That the deed so written and sealed be delivered by the party or some other by his appointment as his deed. And these last things being matters of fact are to be tried by the jurors. 6. That the ground, foundation, end, and purpose of making the deed be good and not against the law. Otherwise in most of these cases the deed is void *ab initio*. Also in some cases to perfect the contract, and make the conveyance of the thing intended to be passed thereby good, some other ceremonies or complements are requisite, as inrolment (*p*), livery

Co. super Lit.
225. 35. 36.
Co. 2. 4. 5.

Perk. Sect.
149. 137.

See *infra*.

See *infra*.

Perk. Sect.
137, &c.

See *infra*.

Purchasers, 2d ed. p. 70.) unless there was fraud on the part of the purchaser, or unless the settlor was in a situation of difficulty and distress and undue advantage taken of it; for then the fraud or the undue advantage would afford a ground on which to give relief although the inadequacy of price was not very considerable.

Deeds or agreements obtained from persons of weak intellect; persons inebriated; by deception or misrepresentation; by undue influence, as by a present from a child, or a guardian from his ward soon after he comes of age; will, generally speaking, be avoided or set aside: So bonds or agreements for procuring or bringing about marriage, (commonly called marriage brokerage bonds), will be also set aside; as will agreements between some of the parties to a marriage contract, where such agreements are in derogation to or inconsistent with some other agreement. And in some cases settlements made by women of their fortunes, without the knowledge of their intended husbands, will be set aside in equity. But for further information on several of the above subjects, see *Treatise of Settlements*, pages 363. 494. and 319.

(*n*) The names of the parties are to be so inserted in deeds as to ascertain them; and therefore if there be sufficient shewn to ascertain the grantor or grantee, and to distinguish them from all others, the grant will be good. The name of the grantor or grantee is not put in the deed to any other intent but to make certainty of the person; and therefore if the Duke of Suffolk by the name of Duke of Suffolk, without his name of baptism, grant annuity, &c. it is a good grant, because there are no more Dukes in England of that name, see Perk. s. 36.—So if a grant be made to T. and Elen his wife, when in truth her name is *Emelyn*, yet the grant is good; for being called the wife of T. reduces it to a sufficient certainty. 2 Roll. Ab. 43.

Where there are two persons of the same name, and the deed does not shew which of them is the person meant, yet it will not be void on that account for uncertainty; but upon the rule, *certum est quod certum reddi potest*, the person meant may be averred. If, however, the evidence fails in ascertaining the grantee, then the deed is void for uncertainty. In conveyances by or to corporations, the corporation should be described by its proper name in order to distinguish from all other corporations.

(*o*) It seldom happens that the grantor or other party to be bound by the deed, either actually seal it himself, or that it is sealed by any third person by his express appointment: The seal is usually fixed by the person professionally employed, and the grantor, or other party to be bound by the deed recognizes the seal to be his; and his delivery without any other ceremony would amount to a recognition of it; for although it is essential that the deed should be sealed, yet it appears to be altogether immaterial by whom the seal is affixed.

(*p*) In bargains and sales, under the statute of the 37 Hen. 8. c. 16. the freehold would seem to be before inrolment, for the inrolment is said to have relation to the execution of the deed. If, however, the bargain and sale is not enrolled within due time (six lunar months), then it will be absolutely void unless it can operate in some other way—as a covenant to stand seized, the grant of a reversion, &c. In the inrolment of the conveyance of a bankrupt's freehold estates, by the commissioners, under the act of the 13 Eliz. c. 7. (commonly called a bargain and sale, although not perhaps with strict propriety

livery of seisin (q), attornment (r); otherwise the deed in part at least becometh fruitless and vain. For a deed may be void, either for *that the writing is not on parchment or paper; or being so, is not legally and formally drawn; or being so, there doth want a person able to give, or make, or capable to have, or take, or a thing to be contracted for; or if so, for that it is not duly sealed and delivered; or if so, for that it is not truly read at the time of the sealing and delivery; or if so, for that it is made void by some special law, as being made upon an usurious contract, by duress, or the like. Or it may at least in part lose its force afterwards by neglect of inrolment, livery of seisin, or attornment, in cases where these things are requisite.

Perk. Sect.
155. Co. super
Lit. 171.

2) Co. super
Lit. 249.
F. N. B. 122.
27 H. 6. 9.
* Co. 2. 3.

Perk. Sect.

Perk. Sect.
155. Co. super
Lit. 225.

Every deed well made must be written, *i. e.* The agreement must be all written before the sealing and delivery of it: for if a man seal and deliver an empty piece of paper or parchment, albeit he do therewithall give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed. 2. This writing must be on paper or parchment, for if an agreement be written on a piece of wood, linen, the bark of a tree, a stone, or the like, and this be sealed and delivered; this is no good deed (s). ^b But it may be written in *any language, or in any hand. And therefore it is held that a deed written in French or Latin, and in Text, Court, or Roman hand, as is good as a deed written in English and in a Secretary hand. ^c And albeit the writing be beside the lines, or the lines be written crooked, yet this will not hurt the deed. ^d And if there be any alteration, rasure, or interlining made in any part of the deed before the delivery of it; this will not hurt the deed (t). But in such cases it is policy to make a *Memo-randum* of it upon the back of the deed, and to give the witnesses notice of it; for otherwise if it be in any place

1. In respect
of the writing
of it.

* P. 55.

priety) no interest passes to the assignees till inrolment. This act however does not, like the act of Hen. 8., prescribe any particular time for the inrolment. Though by a bargain and sale the freehold seems to pass before inrolment, provided the inrolment is duly made, yet it has been held, that if a man purchases the estate and takes the conveyance by bargain and sale and before inrolment grants a lease of the estate, that the lease is void, and is not rendered good by the subsequent inrolment of the bargain and sale. See *Isam v. Morrice*, Cro. Car. 110. The doctrine however that the lease is void, appears to be open to much doubt, for even if it was not good as passing an interest, (though it is conceived it would), yet it would be good, it is presumed, by estoppel. See 3 Durnf. and East's T. R. 371. Pollexf. Rep. 68. and 6 Mod. 258.

(g) After twenty years quiet possession under a feoffment, livery of seisin will be presumed. See *Wright v. Lloyd*, Wightw. 123. Or if such a length of time has not elapsed as to afford a ground for such presumption, a Court of equity, where the feoffment was made for a valuable consideration, would order the deed to be perfected by compelling the feoffor to give livery of seisin, see 1 Vern. 196.

(r) Attornment is now in almost every case unnecessary; but for further information on this subject see the chapter on Attornment.

(s) Wood or stone may be more durable and linen less liable to erasures, but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities; for there being else so durable and at the same time so little liable to alteration. And in order now to give full validity to a deed the paper or parchment on which it is written must be impressed with the proper stamps, otherwise it cannot be given in evidence. The laws however which require deeds to be stamped do not prevent their legal effect and operation where they are not stamped or not properly stamped, but only prevent their being given in evidence till they are properly stamped. The omission before of the proper stamp when the deed is executed is not material, provided it is affixed before the deed is produced in evidence.

(t) See *supra*, page 53, latter part of note (1), on the subject of rasures and interlineations.

material,

material, as in the name of the grantor, grantee, in the limiting of the estate, or the like, and especially if it be in a deed poll, the deed is greatly suspicious. 8. The matter written, must be legal and orderly for manner and matter, i. e. There must be words sufficient to set forth the agreement and bind the parties; for a deed may be void and lose its virtue in all, or part, for repugnancy, uncertainty, and divers other matters: (whereof see in exposition of Deeds, *infra*.) But it is not material whether the deed be in the first, or in the third person, so as the words be aptly applied. For if a deed poll be in the third person, viz. *Quod preces scriptum testatur, &c. quod idem A dedit & tradidit, &c.* Or an obligation be in the third person, viz. *M^a quod I. S. debet I. D. £20, &c.* these are good deeds notwithstanding the statute of 38 E. 3. c. 4. which is meant only of obligations made beyond the seas. So if the words of a deed indented, run in the first person, it is as good as if it were in the third person. Neither is it necessary that the English or Latin whereby it is made, be true and congruous; for false and incongruous Latin or English seldom or never hurteth a deed: for the rules are, *Falsa orthographia non vitiat chartam. Falsa grammatica non vitiat concessionem.* Neither is it necessary that every deed have all the parts of a deed before set down, as promises, *Habendum, &c.* for a deed may be good without *Habendum*, warranty, reservation, or covenant. And a deed is good, albeit these words in the close thereof, *In cuius rei testimonium sigillum meum appositum*, be omitted; and albeit there be no mention made in the same that the deed was sealed and delivered; so as in truth it be duly sealed and delivered, and the sealing and delivery can be proved (u). Also a deed is good albeit it mention no time or place of date or making, or have a false date, i. e. be dated at one time and delivered at another; and albeit it have an impossible date, as the 30th of February, or the like, for anciently until the time of E. 2. and E. 3. the deeds had no date; because the law was then held to be, that if a deed were dated before the time of memory it was not pleadable, except it were of record, but it might have been given in evidence. But he that doth plead such a deed without any date, or with such an impossible date, must set forth the time when it was delivered (x).

3] Co. super
Lit. 225.

Fitz. Falt. &
Feoffments, 3.
Dyer 6.

Co. 5. 1221.
10. 133.
See Oblig.
Numb. 3.

Co. super
Lit. 6.

Co. 2. 5.
Dyer 19.
Kerw. 70.

Co. 2. 5. 5.
117.
Dyer 28.
Perk. Sect.
150.
Co. super Lit.
6.

(u) Deeds made in pursuance of powers, where the power not only requires sealing and delivering but that such sealing and delivering should be attested by a certain number of witnesses, there not only sealing and delivering are necessary, but it is necessary that mention should be made, by way of attestation, of such sealing and delivering, otherwise the deed will be entirely void at law, and if not entire for a valuable, or at least meritorious, consideration will receive no aid in equity; but for further information on this subject, see Mr. Sugden's valuable Treatise on Powers. Deeds under powers sometimes required, by the power, to be signed as well as sealed and delivered, and the signing and delivering to be attested by witnesses; and wherever this is the case the attestation should contain the word signed, as well as the words "sealed and delivered." The omission however, in attestation, of the word "signed," is, in certain cases of deeds executed before the passing of act of the 54 Geo. 3. c. 168. remedied by this act. In creating powers of appointment to be exercised with certain forms or solemnities, it is, generally speaking, the best merely to require the deed to be sealed and delivered, (*saying nothing about signing*) and then there will be little probability that there will be any error in the attestation.

(x) See accordingly *Dodson v. Kayes*, Yelv. 193. If two deeds bear date the same day and are made fealty but one agreement, that shall be presumed to be executed first which will support the clearest intent of the parties. *Taylor v. Horde*, 1 Burr. 106.

Co. 11. 73.
 Plow. 553.
 Perk. Sect. 1.
 119.
 See Grant,
 infra.
 Numb. 4.
 Feoffment, in-
 fra. Numb. 12.

The second thing required in every well-made deed is, that the person making it be able to give, grant, make, or do the thing contained in it; that the person to whom it is made be capable of the thing to be given, granted, made or done thereby; for if it be made by, or to any such persons as are disabled, as infants (y), aliens (z), women covert (a), persons attainted of treason or felony (b), idiots (c), and such like, it will be void in all or part. But any person natural, male or female, or politic, as sole corporations, or corporations aggregate of many, ecclesiastical or temporal,

§. In respect of the persons parties thereto, and matters therein.

(y) Deeds or contracts made by an infant from which no apparent benefit can arise to him are considered as absolutely void. But such as he may derive a benefit from are only voidable; and when he comes of age he may either affirm or avoid them as he thinks fit. There are, however, some exceptions to the generality of this observation; as is in the case of marriage contracts entered into by infants, which, generally speaking, are binding upon them. (See Treatise on Settlements, p. 12.) So by the custom of gavelkind, an infant of the age of fifteen years, may convey his lands by feoffment with livery *propiâ manu*. (See Robinson on Gavelkind, 193.) And in the case of *Zouch v. Parsons*, 3 Burr. 1794, it was laid down, that where an infant is compellable to do any particular act, his doing it shall be binding upon him when he comes of age. In that case an infant mortgagee had conveyed the legal estate without any direction from the Court of Chancery or Exchequer under the act of the 7 Ann. c. 19. and it was held that the conveyance was good, or binding upon the infant when he came of age. The authority however of this case is justly called in question. By the act however just noticed, infant mortgagees and trustees are compellable to convey under the direction of the Court of Chancery or Exchequer.

(z) The policy of the law, generally speaking, prohibits aliens from acquiring real estates to their own use. An alien friend however, who is a merchant, may hold a lease for years of a house for an habitation so long as he resides within the realm. Co. Litt. 2 (h). So with the king's licence, an alien may purchase and hold any estate either freehold or leasehold. An alien who has been naturalized is under no disability to purchase and hold lands; and he may hold even lands which he purchased before his naturalization if no prior office be found; for an act of naturalization cancels all antecedent defects. An alien who has been made a denizen may hold lands purchased after his denization, though not such as he purchased before, unless the letters of denization, granted before office found, confirm his estate in them, and then he may hold them. It is to be understood, that an alien is under no disability to purchase lands, but only to hold them for his own benefit. He holds them in fact for the benefit of the king, and the king upon office found, shall have them by his prerogative. And the alien can make no alienation of them; for immediately upon office found they vest in the king notwithstanding any prior attempted alienation. And if an alien purchases in the name of a trustee, the king will have the same right as if the purchase had been made in the alien's own name. If indeed the trustee should sell the estate to a person who had no notice of the trust for the alien in that case, it is conceived, the right of the king would be defeated.

(a) Generally speaking, deeds executed by married women (except a queen consort) for the purpose of conveying away their estates are absolutely void, and not merely voidable. See however the case of a fine where levied by a feme covert as a feme sole, ante, p. 7. note (w). And the acknowledgements after the death of her husband of a deed executed during coverture, may in some cases amount to a re-delivery, and so render it valid. *Goodright v. Straphan*, Cowp. Rep. 204.

A married woman may without her husband execute a mere naked authority, whether given before or after coverture, and though no special words are used to dispense with the disability of coverture. And the rule is the same where both an interest and an authority pass to the wife, provided the authority is collateral to and does not flow from the interest. (See Mr. Sugden's Treatise on Powers.) A married woman may also convey lands in performance of a condition where such lands are vested in her on condition to convey to others.

A power to convey lands is now frequently given to married women by means of a conveyance to men. See Treatise on Marriage Settlements, p. 334, where this subject is fully treated.

If a husband abjures the realm, or is banished, he is thereby become *civilitèr mortuus*, and his wife is considered as a feme sole and may act in all things as if her husband were naturally dead.

(b) Persons attainted of treason, felony, or præmunire, are incapable of conveying away their estates from the time when the offences were committed provided an attainder follows; for otherwise the king would be defeated of his forfeiture, and the lord of his escheat.

(c) All deeds and instruments executed by idiots and lunatics are totally void, though by the common law neither an idiot or lunatic could avoid his own deed. For fuller information however on the law relating to idiots and lunatics, see Mr. Collinson's Treatise on the subject, and also see Mr. Foulquer's Treatise on Equity; and see *supra*, pages 6 and 49. notes (t) and (g), relative to fines and recoveries by persons *non compos mentis*. By the stat. 4 Geo. 2. c. 10. Idiots, lunatics, and persons *non compos mentis*, being trustees or mortgagees, or their committees, are enabled to convey under the direction of the Court of Chancery.

not disabled by law, may give or take by deed. Also there must be some matter, whereabout the contract may be conversant. It is therefore said, that in every grant there must be grantor, grantee, and a thing to be granted, and in every obligation an obligor, obligee, and thing to which the obligor is bound: and so of feoffments and other deeds.

3. In respect
of the reading
of it.

The third thing required in every well-made deed is, That if the party that is to seal it be a blind or an illiterate man, and desire to hear it read, that it be so; for if such a man be to seal a deed, and he desire to hear it, or to hear the contents of it read or declared to him first, and it be not done, and he afterwards seal and deliver it, this is no good deed. So if upon or without any such request made by him that is to seal and deliver it, the party himself to whom it is made, or a stranger, shall read the deed, or declare the contents thereof, falsely and otherwise than in truth it is, the deed will be void, at least for so much as is so misread or misdeclared. But if the party himself that is to seal and deliver it, before the sealing and delivery thereof cause another that is a stranger covinously to read it, or to declare the contents thereof falsely to him, and otherwise than it is, of purpose to make the deed void, this will not hurt the deed. So if the party that is to seal the deed, can read himself and doth not, or being an illiterate or a blind man, doth not require to hear the deed read, or the contents thereof declared, in these cases albeit the deed be contrary to his mind, yet it is good and unavoidable (d).

Co. 2. 9. 11. 97.
14 H. 8. 26.

4. In respect
of the sealing
of it.

The fourth thing required in every well-made deed is, That it be sealed: but this sealing of deeds in times past was not used, for the Saxons used only to subscribe their names, and to add the sign of the cross, and to set down a great number of witnesses. And afterwards the Normans brought in with them the sealing of deeds; but by degrees, for first the Kings and a few of the nobility used it, and to seal with their seals of arms; afterwards all the nobility used it, and then the gentlemen, and about the time of E. 3, all men began to use sealing of deeds, which hath been continued ever since, so that now it is of necessity, in so much that if a deed be never so well written before and delivered afterwards, yet if it be * not sealed between (e) the writing and delivery, it is not a good deed. But if a stranger seal it by the allowance or commandment precedent, or agreement subsequent, of him that is to seal it, before the delivery of it, it is as well as if the party to the deed did seal it himself. And therefore if another man seal a deed of mind, and I take it up after it is sealed and deliver it as my deed; this is said to be a good agreement to, and allowance of the sealing, and so a good deed.

Terms of the
law.
Fait. Co. super
Lit. 225.
Co. 2. 4. 5.
Perk. Sect.
129.

* P. 57.

Perk. Sect.
130. 131. 132.

(d) A deed must be read whenever any of the parties require it; if not, the deed will be void as the party requiring it to be read. If a person can, he should read it himself; and if he be blind, illiterate, some other person should read it for him. In the case of *Bennet v. Vade* and others 2 Atk. 327. the fact, that neither the rough draft of the conveyance nor the engrossment of it, read to the grantor before the execution of the deed, was held by Lord Hardwicke to be a bar of fraud, and was one of the grounds upon which he relieved against the deed in that case.

(e) See next note, as to the necessity of the deed being sealed between the writing and delivery.

Pert. Sect.
130. 131. 132.

And if the party seal the deed with any seal besides his own, or with a stick, or any such like thing which doth make a print, it is good. And although it be a corporation that doth make the deed, yet they may seal with any other seal besides their common seal, and the deed never the worse. And if there be twenty to seal one deed, and they seal all upon one piece of wax and with one seal, yet if they make distinct and several prints; this is a very sufficient sealing, and the deed is good enough (f).

Pert. Sect.
134.

Co. 2. 4. 5.
Pert. Sect.
137. 9 H. 6.
37.

The fifth thing required in every well-made deed is, That there be a delivery of it. And for this it must be known, that delivery is either actual, i. e. by doing something and saying nothing, or else verbal, i. e. by saying something and doing nothing, or it may be by both: And either of these may make a good delivery and a perfect deed. But by one or both of these it must be made; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force. And though the party to whom it is made take it to himself, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, until it be delivered. And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent, for *omnis rati habitio mandato equiparatur*. And when it is delivered by another that hath a good authority and doth pursue it, it is as good a deed, as if it were delivered by the party himself (g), but if he do not pursue his authority, then it is otherwise. And therefore if a deed, or the contents thereof, be read or declared to a man that is to seal it; and he (being illiterate) doth deliver it to a stranger, and bid him examine it: and if it be so as it was read to him, then to deliver it as his deed, otherwise to re-deliver it to him again that made it; in this case if the deed be, in truth, otherwise than it was read, and yet notwithstanding he, to whom it was delivered, doth deliver it to him, to whom it is made, this delivery shall not avail, neither is the deed by this delivery become a good deed.

5. In respect of the delivery of it, and what shall be said a good delivery; or not.
1. In respect of the person that doth make it.

Pert. Sect.
137. 9 H. 6.
37. Co. 11.
28. 3. 35.
47 E. 3. 3.

(f) No instrument can, technically speaking, be a deed unless it is sealed; and it seems to be considered essential to the validity of the instrument as a deed that an impression must be made on the wax or other substance constituting the seal; and such impression must be made before the delivery of the deed. It is apprehended however, that if there is an impression at the time of the delivery, it is sufficient without regarding whether it was made before or after the instrument was written. It is absolutely necessary that the party whose deed it is should not only seal (or adopt the sealing,) but in most cases he must sign it also; for it is enacted by the statute of frauds, (29 Car. 2. c. 3.) that all leases, estates, interests of freehold, or terms for years, or any uncertain interest in or out of lands or tenements, not put in writing, and signed by the parties making them or their agents, authorized by writing, shall have no greater effect than as estates at will; except leases not exceeding three years from the making thereof, whereupon the rent reserved shall be two-thirds at least of the full improved value of the thing demised; and no such estates or uncertain interests, not being copyhold, &c. shall be assigned, granted, or surrendered, unless by deed or note in writing, signed as aforesaid, by act and operation of law.

(g) A person may appoint another to be his attorney, to execute a deed for him. But in such case it must be executed in the name of the principal and not of the attorney. It would appear, if the grantor is present, and assents to the execution of the deed by a third person, that his assent is a sufficient authority, and that the deed will be good: Thus, the execution of a deed by a partner for himself and his co-partner, who was present and assenting, was, in the case of *Wright v. Dunsterville*, (4 T. R. 313.) held to be the deed of both. (Though query of this case.) In *Wright v. Sykes*, however (7 T. R. 207.) one partner in the absence of the other, and without his authority, executed the deed for both, and it was held that one partner, as such, cannot bind the other deed.

And

2. In respect of him to whom it is made.

*P. 58.

3. In respect of the time.

4. In respect of the manner and order of delivery.

And so also a deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him: or it may be delivered to any stranger for, and in the behalf, and to the use of, him to whom it is made, without authority (k). But if it be delivered * to a stranger without any such declaration, intention, or intimation, unless it be in case where it is delivered as an escrow, it seems this is not a sufficient delivery (i). And yet if an obligation be made to the use of a third person expressed by the deed, and the obligor deliver it to him to whose use it is made; this is said to be a good delivery. And albeit it be delivered before or after the day of the date of it, yet it is good enough: but if it be delivered before it be sealed it is nothing worth (k). And where it is delivered before the date, yet in the pleading of it, it must not be so set forth.

If I have sealed my deed, and after I deliver it to him to whom it is made, or to some other by his appointment, and say nothing, this is a good delivery: so if I take the deed in my hand and use these or the like words; here take it, or this will serve, or I deliver this as my deed, or I deliver it to you, these are good deliveries. So if I make a deed of land to another, and being upon the land, I deliver the deed to him in the name of seisin of the land; this is a good delivery. So if the deed be sealed and lying in a window, or on a table, and I use these or the like words, there it is, take it as my deed; this is a good delivery and doth perfect the deed; for as a deed may be delivered by words without deeds, so may it also be delivered by deeds without words (l). But if a man seal and acknowledge before a Mayor, or other officer appointed for that purpose, a writing provided for a statute or a recognizance, this acknowledgment before such an officer shall not amount to a delivery of the deed so as to make it a good obligation, if it happen not to be a good statute or recognizance (m).

Dyer 167.
Perk. Sect.
137. 8 H. 26.
Co. super Lit.
36. 3. 26. 5.
119. 10 H. 6.
25. 13 H. 4. 2.

Dyer 192.

Co. 2. 4. Plow.
492.

Co. 9. 137.
Dyer 192. 167.
Co. super Lit.
36. 49. 35. Ass.
pl. 6.

Adjudged
Trin. 37. EL.
B. R.

(A) The delivery of a deed may be either absolute, as by delivering it to the grantee himself or to some third person for him without any condition or qualification; or it may be conditional, as a delivery to some third person to keep till some act is done by the grantee; in which case it is not delivered as a deed but as an escrow; that is, a scrowl or writing which is not to take effect or to operate as a deed till the act required to be done by the grantee is actually performed. Delivery of a deed as an escrow vests the right to the deed in the party for whose benefit it is delivered subject to the performance of the condition on which it is delivered. 6 Taunt. Rep. 12.

(i) When an instrument is delivered to a stranger without saying at the time of the delivery for what purpose or for what reason it is so delivered, no inference as to intention arises from the mere act of delivery; but if the delivery is to the party who takes an interest under the deed, the delivery in that case raises the presumption that the deed is to become the deed of the party to whom it is delivered.

(k) A deed takes effect by the delivery, and it is not material whether the delivery be before or after the date; if it is delivered before the date and one of the parties dies before the date, but after the delivery, the deed is nevertheless good. 2 Co. 4 b.

(l) But if a man throws a writing on a table and says nothing and the party takes it, this does not amount to a delivery unless it be found to have been put there with intent to be delivered to the party. Ow. 95. 1 Leon. 140.—If a patron draws a presentation in writing and puts his seal to it and leaves it in his study, and the party for whom it is intended gets it without the privity or licence of the patron and brings it to the bishop and is thereupon instituted and inducted, yet it is all void and no presentation at all. *Grandit v. Baker*, Yelv. 7.

(m) Debt may be brought upon a statute staple or merchant, for the words "*obligari et teneri*" make it an obligation although it be not a statute to all intents; for by delivery of the party it is an obligation, but not a statute until the mayor's hand be put to it. Cro. Eliz. 356. *Hollingsworth v. Assue*.

19 H. 8. Kelw.
 33. 14 H. 8.
 22. 18 H. 6.
 42. Perk. Sect.
 140, 141, 142.
 138. 143, 144.
 Fitz. Feoff-
 ments and Falt.
 4. 13. 15 Co.
 9. 157. super
 Lil. 48. 36.

The delivery of a deed as an escrow is said to be where one doth make and seal a deed, and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himself to whom it is made (n).—The words therefore that are used in the delivery must be after this manner: I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that he do deliver to you £20 for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is. Or else it must be thus: I deliver this as an escrow to you, to keep until such a day, &c. upon condition that if before that day he to whom the escrow is made shall pay to me £10, or give to me a horse, or infeof me of the manor of Dale, or perform any other condition; that then you shall deliver this escrow to him as my deed. For if when I shall deliver the deed to the stranger, I shall use these * or the like words; I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions; or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London; in these cases the deed doth take effect presently, and the party is not bound to perform any of the conditions. So it must be delivered to a stranger; for if I seal my deed and deliver it to the party himself to whom it is made as an escrow upon certain conditions, &c. in this case let the form of the words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions (o); for, *In traditionibus chartarum, non quod dictum, sed quod factum, est inspicitur.* * But in the first cases before, where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force until the conditions be performed, than if I had made it, and laid it by me, and not delivered it at all; and therefore in that case albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, neither will it do him any good. † But when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were delivered immediately to the party to whom it is made, ‡ and no act of God or man can hinder or prevent this effect then, if the party that doth make it be not at the time of making thereof disabled to make it. He therefore, that is trusted with the keeping and delivering of such a writing, ought not to deliver it before the conditions be performed (p); and when the conditions be per-

As an escrow,
 Quid.

• P. 59.

* Fitz. Faits
 and Feoff-
 ments, 13.

idem.

Co. 3. 35.

(n) See accordingly *Whyddon's case*, Cro. Eliz. 520.—ibid. 835. 884.

(o) The non-performance however of the conditions would afford a ground of relief in equity.

(p) A delivery to the party before the conditions are performed would, it is conceived, be completely nugatory; as such a delivery would not be warranted by the authority given to the party to whom the deed was delivered as an escrow.

formed, he ought not to keep it, but to deliver it to the party. For it may be made a question, whether the deed be perfect, before he hath delivered it over to the party according to the authority given him. Howbeit it seems the delivery is good, for it is said in this case, that if either of the parties to the deed die before the conditions be performed, and the conditions be after performed, that the deed is good; for there was *traditio inchoata* in the life-time of the parties; & *postea consummata existens* by the performance of the conditions, it taketh its effect by the first delivery, without any new or second delivery; and the second delivery is but the execution and consummation of the first delivery. And therefore if an infant, or woman covert, deliver a deed as an escrow to a stranger, and before the conditions are performed, the infant is become of full age, or the woman is become sole, yet the deed in these cases is not become good. And yet if a disseisee make a deed purporting a lease for years, and deliver it to a stranger out of the land as an escrow, and bid him enter into the land, and deliver it as his deed, and he do so, this is a good deed, and a good lease, so that to some purposes it hath relation to the time of the first delivery, and to some purposes not.

Co. 5. 84. 3.
36.

Co. 3. 35. 36.

Relation.

P. 60. Double delivery.

In case where a deed is merely void, and doth take no effect by the first delivery, as where a woman covert doth seal and deliver a deed, or the like, and she after, being sole, after her husband's death, doth deliver the deed again, in this case the deed is become good (q). So where a deed originally good, doth become void by matter *ex post facto*, as by breaking the seal, or the like (r); if the party to the deed seal and deliver it again, by this means the deed is become good again. But regularly there may not be two deliveries of a deed, for where the first delivery doth take any effect at all, the second delivery is void.

See infra at Numb. 8.
Perk. Sect. 154. 11 H. 6. 27.

^a And therefore it is held that if an infant, or a man by duress of imprisonment, do make, seal, and deliver a deed, &c. (in which cases the deed is not void but voidable) and after the infant being of full age, or the man imprisoned being at large, do deliver this deed again the second time; this second delivery is void: *Debile fundamentum fallit opus* (s). So if a man be disseised, and make a lease for years in writing, and deliver the deed, and after deliver it upon the ground, this second delivery is void, for the first delivery made it his deed; but if he had delivered it as an escrow, to be delivered as his deed upon the ground, this had been a good second delivery. And by all this that hath been said it appeareth, that the putting to, or subscribing of the party's name or mark to the deed he is to seal, is not essential; for a deed may be good, albeit the

^a Perk. Sect. 154.
1 Co. 5. 119.

Co. super Lit 48.

Subscribing of the party's name or mark not necessary.

New Terms of the law 6
Fait. 9. Jac.
Scott's case.

(q) And see supra, p. 53, note (l).

(r) See supra, page 53, note (l) on this subject.

(s) See accordingly Bro. Abr. Faits, pl. 28. where the first delivery is void, the second shall not be good, but if the first delivery was voidable only, as by an infant or person under duress, it shall not be made good by a re-delivery at full age, or when at large. See further as to double delivery, what cases necessary, Vin. Abr. Fait (N). Roll. Abr. Fait (N).

party that doth seal it doth never set his name or his mark to it, so as it be duly sealed and delivered (f). But it is the best and surest way notwithstanding, to have the name or mark of the party subscribed, for by this means the deed may be the better proved when the witnesses are dead (u).

Note here, that albeit a writing or escrow that is not sealed and delivered in manner as aforesaid, may not be used nor pleaded as a deed, yet it may serve and be used as an evidence and proof of the agreement contained therein. And whatsoever may be done by word without any writing, may much more and better be done by writing unsealed, or sealed, though it be not delivered as aforesaid.

And the last thing required in every well made deed is, that it have a good foundation, and be to a good end; for albeit a deed have all the qualities of a good deed before required, viz. that it be well made, read, sealed, and delivered, yet it may be void, or at least voidable, for other causes; as when it is either unjustly gotten and obtained, or corruptly in pursuit and execution of some dishonest agreement, or to a dishonest end or purpose made. A deed therefore whether it be a feoffment, gift, grant, lease, release, confirmation, or obligation, that is made or obtained by *menace* or *duresse*, i. e. when one doth threaten another to kill or maim him, if he will *not make him such a deed; or doth imprison another, until he make him such a deed; and thereupon he make the deed; a deed thus obtained by force, and through fear to avoid danger, is void, and will not bind him that made it, nor avail him to whom it is made. In which matter these things must be observed: 1. That there must be some threatening of life or member, or of imprisonment; or some imprisonment or beating itself; for if it be only a threatening to take away goods, or to burn a house, or the taking and keeping of a man's goods, or the like, this will not make the deed made upon that occasion to be *per duresse*. 2. It must be a threatening, beating, or imprisonment of the party himself that doth make the deed, or of his wife; for if it be a threatening, beating, or imprisonment of any other besides the party himself that doth make the deed, or his wife, this will not make the deed to be by *duresse*. 3. The threatening, beating, or imprisonment, must be to this end; and hereupon the deed must be made; for otherwise the deed shall not be said to be by *duresse*. As for examples: If four do threaten one to imprison him, if he will not seal a deed to one of them four, and he do so; this deed shall be said to be gotten by *duresse*, and therefore void. And if one threaten a man to

Note.
6. In respect
of the ground
and end of it.

Co. 2. 9.
Perk. Sect.
16. Dyer 143.
43 E. 3. 6.

Bro. Duress
in toto, 9 H.
7. 25. 21 E.
4. 13.

Menace or Du-
resse. Quid.
* P. 61.

(f) See ante, p. 57, note (f), as to the necessity of the deed being signed by the party under the

(u) The mode of proving a deed is by calling the attesting witnesses if living, or if dead by proving hand-writing: A deed however of thirty years standing, where the possession has gone according to the deed, is said to prove itself; that is, there is no necessity for bringing the attesting witnesses to prove it, or if they are dead to bring proof of their hand-writing; unless indeed there is some fraud in the deed, as by rasure or interlineation, in which case it would seem proof of the execution of the deed, or of the death and hand-writing of the witness, must be given.

kill him unless he will seal a deed to him and three others, and he do so; this is void as to all the four. For if one threaten another to kill or maim him, if he will not seal a deed to a stranger, and thereupon he do so; this is void as if it were to the party himself. If one threaten to kill, wound, or imprison me, to make me swear or promise to seal him such a deed, or imprison me until I do so; and afterwards at another time and in another place, when I am at liberty, I do it accordingly; this shall be said to be made by *duress* and void. If I be in prison at one man's suit, and then another man doth cause me to be used more severely in prison, to compel me to make him some deed, which I do thereupon make to him; this deed shall be said to be gotten by *duress* and therefore void (*w*).

But if I be imprisoned at one man's suit (be the cause just or not,) and being in prison I make an obligation or any other deed to a third man; this shall not be said to be by *duress*, but is a good deed. So if one threaten me to take away my goods, burn or break my house, enter upon my land, kill or wound my father or mother, brother, or sister, or friend, or do imprison any of them, and thereupon I seal a deed; this is good and shall bind me (*x*). So if one distrain my beasts, to compel me to seal a deed, and will not deliver them unless I do so, and threaten me that if I take the beasts again and not seal the deed he will kill me, and thereupon I seal the deed; this is a good deed and shall bind me. If I be arrested upon good cause, and being in prison, or under arrest, I make an obligation, feoffment, or any other deed to him at whose suit I am arrested, for my enlargement and to make him satisfaction; this shall not be said to be by duress, but is good and shall bind me (*y*). And therefore if auditors in an account do commit an accomptant to prison, and then he make an obligation to his master for the arrearages, this is good (*z*). And if one in prison for felony grant a reversion of land to another, to help him out of his trouble, this is a good grant (*a*). If *A.* and *B.* enter into an obligation upon the threatening of *B.* only, this is a good obligation by *A.* that was not threatened.

* P. 62.

(*w*) A man cannot plead *non est factum* to a deed obtained by duress, for it is his deed at the time of the action brought; but he may avoid it by special pleading with conclusion of judgment, *si acti* 5 Co. 119.—A deed may be set aside in equity, which has been obtained by *misrepresentation*; for where there is either *suppression veri*, or *suggestio falsi*, it is a constant rule of the court to vacate the deed. 1 Vern. 20. and 1 P. W. 240.—In 2 P. W. 270. If a man is arrested by due process of law and under such arrest is obliged to execute a conveyance never under consideration before, equity will construe it to be a duress and relieve accordingly. *Nicholls v. Nicholls*, 1 Atk. 409.—See more fully as to the execution of deeds by persons under duress, what deeds may be avoided by them, and in what manner. 3 Inst. 482. Bac. Abr. Duress. Vin. Abr. same title, *in toto*.—Com. Dig. Plead. (3 W. 19.)

(*x*) For if he should suffer what he is threatened, he has remedy by action, and may recover damages in proportion to the injury done him; 2 Inst. 483. Perk. § 18. A court of equity however would, it is presumed, set aside a deed obtained under such circumstances.

(*y*) The execution of warrants of attorney by persons in prison is regulated by certain rules of court.

(*z*) Debt upon arrearages of account, defendant shewed that before the account, plaintiff of his own wrong did imprison defendant, and assigned auditors to him in prison, and so the account made by duress; plea held good, and judgment accordingly for defendant. 1 Leon. Rep. 13.

(*a*) But this should be *before* conviction; for *after* the reversion is forfeited. 1 Wood. 803.

Bro. Defeasance 17.

And if one make an obligation by duress, and after being at large take a defeasance upon it, this makes the obligation good again, and the obligee is concluded to say it was by duress.

Term of the Law. Co. 5.
70. 37 H. 8.
c. 9. 39 El. c.
18. 21 Jac. c.
17. 13 El. c. 8.

A deed also made upon or in pursuit and execution of an usurious contract, i. e. such a contract, as whereupon the lender is sure to have in money, or monies worth, for the loan of the thing, above the principal, more than after the rate of £8 (b), for the £100 by the year, also is void. In which matter these cases are to be observed. If one 6 Decembris borrow £30, until the second day of June next following, to pay then for it £33 for the principal loan, if the son of the obligee be then alive; and if he die before that time, that then he shall pay but £27, which is less than the principal; in this case the contract is usurious and corrupt, and therefore the deed that doth contain it is void (c).

Corflet's case.
Pasch. 7 Jac.
B. R.

If one borrow £100, and for this mortgage land above the value of £8 by the year, on condition that if the mortgagor pay the money at the year's end, that the estate shall cease; this is an usurious contract, and therefore the deed, whether it be a deed of feoffment, grant, or lease containing it, is void (d). So if I lend another man £10 for a year, and take security by statute or obligation that the borrower pay me the lender £20 for it; this contract is usurious, and therefore the statute and obligation void. But if the agreement and statute or obligation be, that if the borrower pay not the £10 within the year, that then he shall pay £20 for it; this is no usury, and therefore in this case the deed is good (e). If one come to me to borrow £500 of me, and tell me he is unable to pay it together, and therefore he desires he may pay it in twelve or thirteen years, and doth offer therefore to give me for my kindness £200, over and above besides the use to let

(b) By the act of the 12 Ann. st. 2. c. 16. the utmost legal interest that can be taken is £5 per centum per annum. This act however does not extend to mortgages on estates or other property in Ireland or the plantations, where the interest on such mortgages does not exceed £6 per centum per annum, notwithstanding such mortgages are executed in Great Britain, unless the money lent shall be known to exceed the value of the property given as a security. See act 14 Geo. 3. c. 79.

(c) Though there are authorities in support of this doctrine, yet it is conceived it is not law. Where a sum is to be paid upon a contingent event, though it may be more than the amount of legal interest, yet if in the opposite event no interest at all is to be paid, or a part or the whole of the principal is to be lost, in such a case the transaction is not usurious. See *Chesterfield v. Janssen*, 1 Atk. 301. If indeed the sum to be paid in the happening of the contingency was vastly more than proportioned to the risk run, in that case a court of equity, it is conceived, would relieve against the transaction.

(d) This is clearly not law, unless it is to be understood that the mortgagee should receive the whole profits of the mortgaged premises to his own use without account.

(e) If such a case is not to be deemed usurious, yet it is clearly a case in which equity would relieve. Though an agreement that interest if not paid at the appointed day shall afterwards carry interest is not usurious, yet where such an agreement is entered into previous to the interest becoming due, equity will relieve against it. See 3 Atk. 271. But where the interest is actually due at the time of entering into the agreement such an agreement is held to be good. 2 Atk. 331. 1 Salk. 449. The ground however of the distinction is, perhaps, not very obvious. So where a mortgage is assigned with the mortgagor's consent, interest which is actually due may by agreement of the parties be converted into principal and made to carry interest. 3 Atk. 271. An agreement to increase the rate of interest as from £4 to £5 per cent. if the lesser rate is not paid on the appointed day will be relieved against in equity, and the mortgagee will be compelled to take the lesser rate of interest though not paid on the appointed day; see *Strode v. Parker*, 2 Vern. 316. *Hollis v. Wyse*, 2 Vern. 289. But see the cases of *Halifax v. Higgins*, 2 Vern. 134. and *Brown v. Barkham*, 1 P. Wms. 632, where an agreement to pay an additional rate of interest was enforced. Where there is an agreement to reduce the interest as from £5 to £4 per cent. provided the lesser rate is paid on a certain day, in case it is not paid on the day appointed the larger rate must be paid, and equity will not compel the mortgagee to accept the lesser. See *Jory v. Cox*, Prec. in Cha. 160. *Nicholls v. Raynard*, 3 Atk. 520.

him

him have it so, and then the £500, the interest, and the £200 is cast together, and so we agree upon an annuity of £80. *per annum* for fourteen years, which is assured by conveyances unto me; in this case the contract is usurious, and all the assurances made to perfect it are void. And yet regularly, where the principal money is lost, the contract is not usurious (f). If a man desire to borrow of me £100 for a year, and I am content to let him have it for the use of £8, *but withal I compel him to take a lease of me of a house at £60 rent, which in truth is worth but £30, this contract is usurious, and therefore the assurances thereupon made, are void. *Et sic de similibus*. But if a man the 17th of July, 1579, grant me a rent of £20 *per annum* for the loan of £100, to be paid every half year, and the first payment at Christmas 1580; and it is agreed between us, that if he pay the £100 the 17th of July, 1580, that then the rent shall cease; this contract is not usurious; and therefore the assurances thereupon made, are not void but good (g). But if in this case there be a private or collateral agreement between us, that he shall not pay the £100, and redeem the rent, and that clause be put in only to evade the statute, then is the contract usurious notwithstanding, and the deeds and assurances thereof void. *Et sic de similibus*. If one borrow £100 after the rate of £8 *per centum*, and the borrower do afterwards pay part of the principal, and all the use, within the year; and the lender doth receive it, or the lender doth sue for his money within the year; these subsequent acts do not make the contract, or deeds or assurances thereof, void, for it is a rule, that if the original contract be not usurious, no matter *ex post facto* can make it so (h). If one borrow of me £10, and bind himself to pay me by a day, and moreover bind himself that if he pay it not by the day, that he shall pay me £20 for it; this contract, and the deed for perfection of it, are good; and this is not usurious, for all obligations with conditions, for payment of money lent, are of this nature (i). And

Curia Hil.
14 Ja. B. R.
Saunders's case.

Co. 5. 69.

Hil. 7 Jac.
B. R. Curia,

Bro. Obliga-
tion, 79.

(f) The statute against usury does not extend to the purchase of annuities for lives where the purchaser's principal is *bonâ fide*, and not colourably, put in jeopardy. But by the act of the 53 Geo. 3. c. 141. a memorial of the securities for such annuities must be enrolled according to the form prescribed by the said act, otherwise such securities will be void. Where indeed the annuity is secured upon freehold, copyhold, or customary lands in Great Britain or Ireland, or the colonies, of equal or greater value than the annuity, (over and above any former annuity, and the interest of any principal sum charged on such lands of which the grantee had notice,) whereof the grantor is seized in fee-simple or fee-tail in possession, or where he is enabled to charge the fee-simple, or upon the actual transfer of stock in the public funds, the dividends whereof are of equal or greater value than the annuity, there no memorial is necessary: nor is a memorial necessary in the case of voluntary grants of annuities. In grants of annuities, the circumstance of giving the grantor the option of re-purchasing the annuity does not make the transaction usurious; for such an option is for his benefit and does not impose upon him any obligation to re-purchase. A stipulation however that he should re-purchase would make the transaction usurious.

(g) The case put, is not very intelligible. If it is meant that the principal is to be repaid at all events, and that £20 a year is to be paid in the mean time, there is no doubt but the transaction is usurious.

(A) But although the original contract might be good, as it of course would be if it was not for more than legal interest, yet if afterwards the lender received more than legal interest in consideration of his letting the money remain on the security beyond the day of payment, this would be clearly usury and the penalties of the statute would be incurred.

(i) If in such a case as the one put, more was repaid than the sum lent and £5 *per cent.* interest, such payment, it is conceived, though made after the day appointed for payment, would render the transaction usurious.

yet

Per Just.
Brigman, Hil.
7 Car. 1.

yet if one borrow £100 of me and for this mortgage land to me of a greater value than £8 *per annum*, on condition that if he pay the money at any time before the year's end, then the assurance to be void; this should seem to be an usurious contract; for in this case I am sure to have by the agreement more than after the rate of £8 *per centum* (k), and so it is not in the last case before. If one borrow £100 for a year, and give the broker £20 to procure it; this will not make the contract usurious, nor the assurances void: but for this the broker may be punished (l).

Also all obligations, made to a sheriff, contrary to the statute of 32 H. 6. c. 10. are void, or at least voidable by pleading: out of this see in Obligations, *infra*.

Stat. 27 Eliz.
ch. 4. Co. su-
per Lit. S.
stat. 39 Eliz. ch.
18.

A deed also made, containing the grant of any thing, with intent and of purpose to deceive and defraud one that shall afterwards buy the same thing, is void, for it is to this purpose provided by a statute law, that all fraudulent conveyances of land or any rent or profit out of land, made by whomsoever, with intent to deceive or defeat any that shall purchase the land, or any rent or profit out of it, for money, or other good consideration, of the fruit and effect of their purchase, shall be void against such purchasers, for so much as they buy, and against all others that come in by or under them. But all such conveyances as are * made *bonâ fide* and upon good consideration, are not to be accounted fraudulent (m). For the better under-

Obligations made to a sheriff contrary to the statute.

Collusion in fraudulent conveyances.

1. To deceive purchasers.

* P. 64.

Co. 3. 1.

standing

(k) See note (d) page 62, on a point exactly similar.

(l) The stat. 12 Car. 2. 13. § 3. (confirmed by 13 Car. 2. c. 14.) inflicts a penalty of £20, and imprisonment for half a year on scriveners, brokers, and others, who take more procuration money than 5s. for every £100 for a year, and the statute 17 Geo. 3. c. 26. § 7. allows brokers to take 10s. for the loan of every £100 advanced as the consideration for an annuity.

(m) Even though they are concealed, or were secretly made, Cro. Jac. 455. The statute 27 Eliz. c. 4. avoids deeds and conveyances made to defraud purchasers for money or other good consideration; and the statute 13 Eliz. c. 5. avoids all deeds, conveyances, &c. made to defraud creditors of their just and lawful actions, so far as such deeds have that effect. As these are very important acts, and as little information, except what is scattered through the reports, is to be found upon them, it may not be improper to consider them somewhat fully.

Under the act of the 27th Eliz. there never has been a doubt, but that conveyances, if positively fraudulent, were completely void against subsequent purchasers for a valuable consideration and without notice. Such indeed was the doctrine of the common law, and nothing can be clearer, than that a case so circumstanced, comes fully within the act of the 27th of Eliz. But whether voluntary conveyances or settlements, in which there is no positive fraud, (and it is upon such conveyances or settlements that questions most frequently arise), are void against purchasers, is a point upon which there has been a considerable difference of opinion.

On one side it has been contended, that although a *prima facie* presumption of fraud arises upon a voluntary conveyance, yet that that presumption may be repelled by circumstances; and that where it is repelled the conveyance is good. And the reason which is given for holding this opinion is, that the act of the 27th of Eliz. does not affect voluntary conveyances as such but only fraudulent ones; for it only speaks of fraudulent conveyances—the word *voluntary* not once occurring in it.

On the other hand it has been contended, that although the act does not affect voluntary settlements *in nominis*, yet, that according to its spirit and true construction a voluntary settlement must always be deemed fraudulent against a purchaser for a valuable consideration; at least, where the purchaser has no notice of it.

Most of the authorities upon this agitated point, were noticed by Lord Ellenborough, in the case of *Doe v. Otley*, (9 T. R. 59.) and his Lordship observed, that the “weight, number, and uniformity,” of those which held a settlement to be fraudulent and void against a subsequent purchaser merely from being voluntary, greatly preponderated. The court therefore determined, that the settlement, in the case before them, was void against a purchaser merely from being voluntary.

It is worthy of remark, however, that the court does not appear to have determined so, because they conceived the true construction of the act of the 27th of Eliz. required such determination; but because the decisions upon the act, which had held voluntary conveyances or settlements to be void against purchasers, merely from being voluntary, were found to preponderate. So far indeed, from thinking that the true construction of the act required such determination, it would appear that they were of a directly opposite opinion; for Lord Ellenborough observed, that in *Doe v. Rutledge*, Lord Mansfield

standing of which statute, and the law in these cases, observe, that conveyances *bonâ fide* are opposed to such as are

Mansfield had stated, "that in the statute, there was not a word that impeached *voluntary* settlements merely as being voluntary, but as fraudulent and covinous;" and "that his Lordship had noticed the third section, which subjected parties to such fraudulent grants, who should attempt to defend them, to forfeiture and imprisonment, as if such practices were a crime; in which light no person making a mere voluntary settlement, by way of provision for his family, was ever considered to stand. This section," continues Lord Ellenborough, "furnishes, most unquestionably, a very strong argument in favour of that construction; and had these cases not been opposed by many others of great weight and authority, there would have been but little doubt in our minds, as to this construction being the right one." This opinion may be thought to leave the question under consideration, viz. whether voluntary conveyances as such, are void against purchasers, still open to doubt, even though cases subsequent to that of *Doe v. Otley*, (see *Hill v. The Bishop of Exeter*, 2 Taunt. 69. *Metcalf v. Pulvertaft*, 1 Ves. & Bea. 183. and *Doe v. James*, 16 East's T. R. 212.) have held that they are; for it might perhaps be urged, that no number of decisions upon a question which must be determined by the meaning of an act of parliament can be considered as settling it, where these decisions are not warranted by the true construction of the act. If, the Editor however, may be allowed to express his own opinion,—differing, as it does, from that of Lord Ellenborough, he would be inclined to say,—that the cases in which it has been held, that voluntary settlements are void against purchasers merely from being voluntary, are cases founded on the true construction of the act; at least, that those are so, where the purchaser had no notice of the settlement.

It is pretty generally understood, that to ascertain the true meaning of an act of parliament the whole of it must be taken together; and that one part of it may be expounded and elucidated by another. In expounding the act of the 27th of Eliz. there is one clause of it which has been little attended to, though it appears to throw no little light upon the true meaning of the act. The clause alluded to is that, which excepts out of the operation of the act,—conveyances "for a good consideration, and *bonâ fide*." Now it can hardly admit of doubt, but that the legislature intended to subject all conveyances to the operation of the act, but those which are expressly excepted out of it. If so, all conveyances are within its operation,—except such as are "for a good consideration, and *bonâ fide*." Taking this for granted, the question then is, what is to be deemed a conveyance, "for a good consideration, and *bonâ fide*." If that point is once ascertained, all difficulty upon the act immediately vanishes; for every conveyance which is NOT for a good consideration, and *bonâ fide*, must come within it.

In determining what is to be considered a conveyance "for a good consideration, and *bonâ fide*," the principal difficulty seems to arise from the sense in which the word "good," is to be understood;—whether it is to be understood as signifying *valuable* or not. If it is to be understood as signifying *valuable*, (and it can hardly be doubted that such is the signification) then the act excepts out of its operation, conveyances "for a valuable consideration, and *bonâ fide*." And these being the only conveyances excepted out of its operation all others are necessarily within it; and consequently *voluntary* conveyances are within it; and Lord Ellenborough's opinion, that *voluntary* conveyances, as such, are not within the act is clearly ill founded, whilst the authorities which have held that they are, rest upon a sound basis; viz. on the true meaning and intention of the act.

But as the correctness of the opinion, that *voluntary* conveyances, as such, are within the operation of the act, depends upon the correctness of the opinion, that the expression "good consideration," in the clause above mentioned must be understood to mean, *valuable* consideration, it may be proper to state the Editor's reasons for thinking that it must be so understood. It may be observed, that in the preamble the act speaks of purchases for money or other good consideration, and the enacting part declares, that fraudulent conveyances shall be void against purchasers for money or other good consideration. In these two places the expression, "or other good consideration" must evidently be understood to mean, or other *valuable* consideration; for the expression, "or other good consideration," having relation to the antecedent "money," must clearly mean, or other consideration of the like nature with money; and consequently must mean, "or other *valuable* consideration." Lord Coke, indeed, (speaking of the sense in which the words "good consideration," are to be understood in these places) expressly says, that they mean *valuable* consideration; (3 Rep. 63.) and the Master of the Rolls, in the case of *Taylor v. Jones*, (2 Atk. 600.) expressed himself of the same opinion. Now it is fair to presume, that the legislature intended to use the same expression, in the same sense, throughout the act; and therefore, wherever the expression "good consideration" occurs, *valuable* consideration must be understood to be meant; consequently that it must be so understood in the clause which excepts conveyances for a good consideration from the operation of the act. And of opinion, that the expression "good consideration" in this clause must be understood to mean "valuable consideration," is strengthened by the sense in which the expression "good consideration" must of necessity be understood in the 6th section; which excepts from the operation of the act mortgages, made *bonâ fide*, and upon good consideration. Now it is clear that a mortgage, made upon good consideration must always be a mortgage for a *valuable* consideration,—for a mortgage can not possibly be made for that kind of consideration, which is technically denominated, "a good consideration"—as that of blood. And besides these reasons for thinking, that the expression "good consideration," must mean *valuable* consideration, another may be mentioned; viz. the circumstance of the expression *good consideration* being coupled with the term *bonâ fide*,—for the term "*bonâ fide*," seems to be inapplicable to that kind of consideration, which is usually denominated, a good consideration.

are upon and with any trust express or implied : and good considerations are set down in the statute to distinguish from

It is a term borrowed from the civil law, and means, *real or fair*, as placed in opposition to *fictional or pretended*. Now it cannot be supposed that a *good consideration*, as that of blood, is ever fictional or pretended : For whether *A. B.* is son, or brother, or cousin, to *C. D.*, is a fact which can always be ascertained ; consequently, there can be no inducement for inserting a fictional "*good consideration*." But a valuable consideration, may be a fictional or pretended one ; because, where a conveyance is expressed to be made for *money*, it may be often difficult to prove the contrary ; consequently, there may be inducement to make it a *fictional* consideration. The expression, therefore, in the act, "*good consideration, and bona fide*," appears to mean, a "*valuable consideration*" which is real, and not fictional or pretended. The meaning therefore of the expression "*good consideration*" in all the last noticed clauses tends to render it pretty clear, that all conveyances are within the operation of the act, except conveyances for a *valuable consideration and bona fide*, and consequently that *voluntary* conveyances *as such* are within its operation. As to the penal clause, which has been considered as militating against this opinion, it does not in fact appear to afford any argument against it ; for the penalty it will be observed, is not for *making* the fraudulent conveyance, but for *selling it up and defending it to the disturbance or hindrance of a purchaser*. Had a penalty been imposed for *making* a fraudulent conveyance, then there would certainly have been strong reason for contending ;—that a conveyance, *merely from being voluntary*, ought not to be brought within the operation of an act which imposed a penalty only on *fraudulent* conveyances ; as the necessary consequence of doing so would be to expose men to penalties for the most innocent and even laudable transactions. But as the act does not impose any penalty for the *making* of a conveyance even in reality fraudulent, the penal clause, it is conceived, affords no reason why a voluntary settlement, *as such*, should not be considered as within the operation of the act ; for if it is not *set up and defended to the disturbance of a purchaser*, no penalty is incurred.

Upon the whole, there can be no doubt, but the act of the 27th *Eliz.* avoids *voluntary* conveyances, *as such*, against subsequent purchasers for a valuable consideration. But it only does this, it is apprehended, where the purchaser has *no notice* of the voluntary settlement. In the case of *Doe v. Otley*, indeed, and some others, a voluntary settlement has been held to be void, even against a purchaser *with notice* ; and Lord Ellenborough, in *Doe v. Otley*, seemed to consider it so *by force of the act*. In his argument in that case, his Lordship observed, "that it would have been better if the statute had avoided *voluntary* conveyances *only* against purchasers for a valuable consideration *without notice* of the prior *conveyance*." There is reason to think, however, that there must be some error in the report of this part of his Lordship's argument ; for it is impossible to suppose that his Lordship could mean,—that the act avoided a *voluntary* conveyance against a purchaser *with notice*, when he had but just before expressed himself of opinion, that a voluntary conveyance, *as such*, was not within the act at all.

But notwithstanding the observation imputed to Lord Ellenborough, there is every reason to think, that the act does *not* avoid voluntary conveyances as against purchasers *with notice*. If, indeed, the act had made *fraudulent* conveyances void against purchasers *with notice*, then it must have been admitted, (it being contended that voluntary conveyances, *as such*, are within its operation,) that a regard to consistency of construction would have required,—that mere *voluntary* conveyances must also have been considered as void against purchasers *with notice*.

But the act, in fact, avoids *fraudulent* conveyances against those *only*, whom they were made to *defraud and deceive*. It does not make them void absolutely and *ab initio*, or against all the world. If it did, then it must have been admitted that it also avoided *voluntary* conveyances *as such*, against purchasers *with notice*. The act, however, only avoids fraudulent conveyances, as against those *whom they were made to defraud and deceive*. Now how can a purchaser say that a settlement was made to defraud and deceive him where he had *full notice* of it ?

Taking it as clear that the act does *not* avoid voluntary conveyances as against purchasers *with notice* ; the question is,—can the *authorities* be considered as having *settled*, that they *are* to be considered as void against such purchasers.

The earliest authority, it is believed, in which it was held that a voluntary conveyance was void against a purchaser *with notice*, is *Standen's case* (cited 5 Rep. 60 b.) ; and in *Goock's case*, (5 Rep. 60.) there is a resolution of the Court of Common Pleas to the same effect.

In *Tomkins v. Ennis*, the court said that a voluntary settlement was void against a purchaser, though he had express notice ; adding, that the 27th of *Eliz.* made voluntary settlements void as against purchasers, with, or without notice. And in *Chapman v. Emery*, (Cowp. 278), Lord Mansfield expressed himself to the same effect. Now we have seen that there is reason to think, that the act of the 27th of *Eliz.* does *not* make voluntary settlements void against purchasers *with notice* ; and therefore the acts in *Tomkins v. Ennis*, and *Chapman v. Emery*, cannot be considered as having much weight upon the point we are considering,—as the court, in both these cases founded their opinion upon an erroneous ground.

In *Senhouse v. Earle*, (Ambl. 285.) Lord Hardwicke held a voluntary settlement to be void against a purchaser *with notice* ; and in *Evelyn v. Templer*, (2 Bro. C. C. 147.) Lord Thurlow did the same. To judge, however, from the report of the latter case, Lord Thurlow appears to have disposed of it rather hastily, and without at all considering whether *notice* did not make a difference.

The

from such as are not valuable, as nature, blood, and the like. If one convey land with a present or future power of

The case of *Taylor v. Still*, or *Steel v. Downes*, (in Cha. 1763. noticed in a MS. opinion of Mr. Butler's, in the Editor's possession,) may be noticed as, perhaps, one of the strongest authorities in support of the doctrine,—that a voluntary settlement is void against a purchaser with notice; for in that case, the point of notice appears to have been a good deal considered.

The cases above noticed, and the recent ones of *Doe v. Otley*, *Hill v. The Bishop of Exeter*, *Doe v. James*, and *Metcalf v. Pulbertoft* above noticed, are believed to be the only ones in favour of this doctrine; and that some of them are not of much weight is pretty evident. On the other side, in *Woodie's case*, (Cro. Jac. 158.) it was adjudged, that making a voluntary settlement, and afterwards selling without notice was within the statute;—from which it may be inferred, that the court would have determined differently had the purchaser bought with notice. And in the case of *White v. Stringer*, (2 Lev. 105.) the court observed that the purchaser was not deceived for that he had notice of the settlement.

So in an anonymous case, (1 Eq. Ca. Ab. 354. (4.)) it was said that a voluntary settlement was good against a purchaser with notice, though not against one without. And in *Doe v. Rutledge*, (Cowp. 712.) Lord Mansfield observed,—“but with respect to voluntary family settlements, to be sure, notice varies it much.” And the case of *Biscoe v. The Earl of Banbury*, (1 Cas. in Cha. 287.) is a strong authority; as it was there determined that a voluntary settlement was good against a purchaser who had merely constructive notice of it. (Though it is conceived, that a purchaser with notice has no claim to the benefit of the act of the 27th of Eliz., yet, perhaps, nothing but positive notice should deprive him of its aid.)

In addition to these authorities, may be noticed what was said by the late Lord C. J. Mansfield, in the case of *Doe v. Martyn*. (1 Bos. & Pul. New Rep. 335.) In that case, his Lordship observed, “that he regretted that it had ever been decided, as it was in *Exchyn v. Templer*, (2 Bro. C. C. 147.) that “even notice of the prior settlement would not defeat such a purchase.” And this observation of his Lordship's is intitled to the more attention, from the circumstance of its being made in a case which did not require that the point should be even adverted to; for in the case before the court the purchaser had no notice: Therefore one cannot help thinking, that his Lordship made it for the sake of reprobating a doctrine, which he considered as unreasonable and unjust*.

In *Colville v. Parker*, (ubi sup.) *White v. Hussey*, *Oxley v. Lee*, (Prec. in Cha. 14.) *Fitz James v. Moya*, (1 Atk. 624.) and *Gardner v. Painter*, (1 Sid. 133.) it is mentioned, in the statement of the case, that the purchaser had no notice; and, perhaps, that circumstance might influence the decision in these cases.

The above, it is believed, constitute the principal, if not all the authorities on both sides of the question; and it is admitted that those, in which voluntary settlements have been held to be void against purchasers with notice, certainly preponderate. It will be recollected too that in the latest authorities upon the point, a voluntary settlement was held to be void against a purchaser with notice. But whether the authorities must be considered as having settled the point is another matter. It may be observed, that the act of the 27th of Eliz. does not seem to require any such construction, as that a voluntary conveyance shall be void against a purchaser with notice—that authorities the other way are not wanting,—and that it seems repugnant to every moral principle and every conscientious feeling, to be knowingly instrumental in disappointing those hopes and expectations which the voluntary settlement may have raised in those upon whom it was made. It may be further observed, that by holding a voluntary conveyance with notice to be void against purchasers, the Courts have put a construction upon the act which it was never intended to bear, and it may be well questioned whether the judges of succeeding times are to be bound by the errors of their predecessors, more especially where such errors are fraught with consequences so manifestly repugnant to the principles of justice.

But even supposing that the authorities must be considered as having settled, that a voluntary conveyance is void against a purchaser for a valuable consideration, even though he has notice of it, yet it may be proper to observe, that if the purchaser has not only notice but takes an indemnity against the settlement, that there he will be bound by the settlement,—for by taking the indemnity he shewed that he did not rely upon the statute but upon his indemnity: (*Jennings v. Sellack*, 1 Vern. 467. *White v. Stringer*, ubi sup.) Admitting too that a voluntary conveyance must, in fact, be considered as void against purchasers with notice, yet a person ought to be very cautious in purchasing, when there is what appears to be a voluntary family settlement; for though the settlement may appear to be voluntary, yet it may happen to be made for a valuable consideration. As for instance, it may be made in pursuance of articles before marriage, though the articles may happen not to be noticed in the settlement; and in case it was, there is no doubt, it is apprehended, but upon the article being produced, the parties claiming under the settlement would prevail against the purchaser. As the same would be the case, if the settlement was made for any other valuable consideration: As notwithstanding the consideration did not appear on the face of the settlement, yet the settlement, as conceived, would nevertheless be good upon the consideration being proved. See *Chapman v. Emery*, 1 Cowp. 280. ubi sup. *Ferrers v. Cherry*, 2 Vern. 384.

* See *Smith v. Garland*, 2 Meriv. 123. where the Master of the Rolls decreed that a person who had made a voluntary settlement, could not enforce a specific performance of a contract for the sale of the estate against a purchaser who had notice of the voluntary settlement.

of revocation, or alteration, at his will that doth convey it; this shall be said a fraudulent conveyance, as against him

It may here be proper to state, that voluntary settlements and conveyances are void against purchasers for a valuable consideration without at all regarding, whether they are in favor of mere strangers, or of persons who have the strongest natural claims upon the settler,—his wife and children. See *Shaw v. Standish*, ubi sup. *Douglass v. Waad*, ubi sup. *Chapman v. Emery*, Cowp. 278. *Ozley v. Lee*, ubi sup. *Lavendar v. Blackstone*, 2 Lev. 146. *Goodright v. Moses*, Black. 1019. *Evelyn v. Trepier*, 3 Bro. C. C. 147. *Doe v. Hopkins*, cited 9 T. R. 70. Nor will their being otherwise totally unprovided for make any difference. See *Lavendar v. Blackstone*, ubi sup.

Neither will the circumstance, of the settler being free from debt at the time, entitle a voluntary settlement to any greater favor*. (*Doe v. Otiley*, ubi sup.) Nor will the circumstance of the settlement not comprising all the settler's estate. See *Doe v. Otiley*, ubi sup. and *Lord Townsend v. Windham*, 2 Ves. 10.

And if by the terms of the settlement it is made to take effect immediately, and the settler accordingly gives up the possession of the estate, yet as against a purchaser for a valuable consideration it would clearly be void.

As against a purchaser without notice, a voluntary conveyance even in favour of the king will not be good. See 11 Rep. 74 a.

It may be observed, that the species of conveyance by which a voluntary settlement is made is perfectly immaterial: nor will it acquire any validity by a fine being levied or a recovery suffered to the uses of the settlement. See *Douglass v. Waad*, ubi sup. *Fitz James v. Moys*, ubi sup. *Farmer's case*, 3 Rep. 79. *Leach v. Doran*, Rep. in Cha. 78.†

So if a voluntary settlement is made in execution of a general power of appointment it will be fraudulent and void against a subsequent purchaser. See 2 Ves. 65.

But although it may be laid down as a general rule, and as one perhaps which has no exception, that according to the true construction of the act of Eliz. voluntary settlements of freehold or leasehold lands, of which the settler is seized either in possession or reversion†, are void against purchasers who have no notice, (and according to the authorities even against purchasers who have notice,) yet we must be careful to understand, that such purchasers must be fair purchasers for a valuable consideration; for though the act speaks of purchasers for money, or other good consideration, yet we have already seen, that in the construction of this act, "good consideration," means valuable consideration.

And the consideration must not only be a valuable, but it must also be an adequate consideration; at least, so far adequate, as both to repel the presumption of fraud and over-reaching on the part of the purchaser, (see the observation by Lord C. J. Anderson, in *Upton v. Bassett*, Cro. Eliz. 445. and see *White v. Stringer*, 2 Lev. 106. *Metcalf v. Pulvertoft*, and *Doe v. James*, 10 East, Rep. 212.) and of collusion and contrivance between him and the settler. *Doe v. Rutledge*, Cowp. 705. *Upton v. Bassett*, ubi sup. and *Metcalf v. Pulvertoft*, 1 Ves. & Bea. 184.

It may not, perhaps, be improper to observe, that mortgagees (*Chapman v. Emery*, Cowp. 278. *Jones v. Parfey*, ubi sup. *Bentham v. Harcourt*, Prec. in Cha. 30. *White v. Hussey*, ib. 14.) and lessees, (*Goodright v. Moses*, ubi sup. *Shaw v. Standish*, ubi sup. *Cross v. Fanstenditch*, Cro. Jac. 181.) are to the extent of their respective interests, considered as purchasers and entitled to the benefit of the act of the 27th of Eliz. Even a lessee at rack-rent, is held to be so. (*Goodright v. Moses*, ubi sup.) But subject to the mortgage or lease the voluntary settlement will be good. (*Ward v. Cartwright*, ib. in Ch. 59.)

And marriage being a valuable consideration, a settlement upon marriage, (or even after marriage, if made in pursuance of articles entered into previous to it,) will be good against a prior settlement which is merely voluntary. *Douglass v. Waad*, ubi sup. per Lord Mansfield, *Doe v. Rutledge*, ubi sup. *Mandell v. Breary*, 2 Vern. 483. *Brown v. Jones*, 1 Atk. 188.

* In *Holcroft's case*, (Dyer 294, in note) the court held that a voluntary settlement upon children was void against a purchaser if the settler was not indebted when he made it. But this case (if the court meant that the settlement would be good against a purchaser without notice) cannot, it is conceived, be looked upon as law.

† It must not be supposed, however, that the fine or recovery will be always without any operation as a case. For if the fine is levied or recovery suffered of an estate tail, they will have just the same operation in destroying the estate tail, as they would have had in case no voluntary or fraudulent uses had been declared of them. It will only be the voluntary or fraudulent uses that will be destroyed by the fine or recovery will, in fact, ensure to the use of the purchaser.

In the case indeed, of *Buckley v. Arnold*, (2 Eq. Ca. Ab. 752.) Lord Cowper seems to have thought, that a voluntary settlement of a reversion, expectant upon an estate tail would be good against a purchaser; because, at the time of making the settlement the reversion was of no value and might have been destroyed by the tenant in tail. But this, it will be observed, is merely an opinion of his Lordship's and the soundness of it may be well questioned.

him that shall afterwards purchase this land. So that if Co. s. 32. ss. one convey his land to the use of himself for life, and after

The question has been agitated, and does not appear to be yet settled, whether the act of the 27th of *Eliz.* extends to copyholds or not. In the case of *Doe v. Rutledge*, (ubi sup.) Lord Mansfield thought that it did,—his Lordship observing, “that construing it to do so, could work no prejudice to the lord;” and that the object of the statute was to suppress fraud.” There appears however to be reason to think that copyholds are not within it; for unless we acquiesce in the harsh doctrine, that a purchaser may avoid a voluntary conveyance *even though he has notice of it*, a case cannot possibly arise where there can be any necessity for the purchaser of a copyhold to resort to the act for protection. The legal title appearing on the face of the court rolls the purchaser can always ascertain who has it; and by taking a surrender from the person who has, and also from those, who on the face of the court rolls, appear to have any equitable interest, and by getting duly admitted upon such surrender, he will be perfectly safe, it is apprehended, without any aid from the act of *Elizabeth*.

The act of the 27th of *Eliz.* only speaks of fraudulent conveyances of “lands, tenements, and hereditaments.” It is therefore clear, that it does not extend to voluntary assignments or settlements of personal chattels, and consequently a purchaser can only avoid a voluntary settlement or assignment of personal chattels either where it is positively fraudulent, or from circumstances, is *presumptively so*;—for there is no principle of law, which makes voluntary settlements, as such, void against purchasers. Positive fraud however can rarely be proved in voluntary settlements or conveyances: Therefore, in voluntary assignments or settlements of personal chattels it can only, generally speaking, be on the ground of circumstantial fraud on which they can be impeached. This renders it proper to enquire what circumstances are considered as signs, or badges of fraud. And first it may be observed, that the settler being in possession of the thing settled at the time he sold it, must be deemed an indicium of fraud; (see *Troyné's case*, 3 Rep. 81. *Stone v. Grubham*, 2 Bulstr. 218. *Ryall v. Roll*, 1 Atk. 170. *Edwards v. Harben*, 2 Durnf. & East's T. R. 587. *Bamford v. Barron*, cited 2 Durnf. and East's T. R. 594. *Meggott v. Mills*, 1 Lord Raym. 286. *Reed v. Blades*, 5 Taunt. 212.) and if the presumption of fraud, arising from such circumstance, is not repelled by some other circumstance, the assignment or settlement it is conceived, must be considered as void against a purchaser without notice. The case indeed of *Kydd v. Raulinson*, (2 Bos. & Pul. 59.) may be thought to militate somewhat against this opinion; but the authority of that case is considered as doubtful.

But although continuing in possession, must be considered, generally speaking, as a badge of fraud; yet the presumption of fraud arising from such circumstance may be repelled by shewing—that the possession was consistent with the terms of the settlement: (*Bucknall v. Royston*, Prec. in Cha. 285. *Cadogan v. Kennet*, Cowp. 452. *Lady Arundell v. Phipps*, 10 Ves. 145. *Edwards v. Harben*, ubi sup.) Therefore if a person makes a voluntary settlement of personal chattels and limits a life estate in them to himself, there the circumstance of being in possession would not be considered as affording any proof of fraud. The fraud, therefore, must be evinced by some other circumstance than that of being in possession. This, therefore, leads to the enquiry, what circumstances, in such a case, would be considered as affording an evidence of fraud. An unusual degree of secrecy in making the settlement, would be looked upon, it is conceived, as an evidence of fraud. So, probably, would the circumstance of the settler being greatly indebted at the time he made it.

But supposing that the settler was not greatly in debt, and that there was no unusual secrecy, nor, in fact, any circumstance indicative of fraud, unless the concealment of the settlement from the knowledge of the purchaser, could be considered so, might fraud, it may be asked, be inferred from that circumstance? This question is suggested for the reader's consideration. It must be obvious, that it is desirable there should be some ground or other, on which every voluntary settlement of personal chattels where the settler is in possession, should be considered as fraudulent and void against a purchaser without notice: for to hold that a voluntary settlement of chattels, where the settler was in possession, might in any case be good against a purchaser without notice, would be opening, it is feared, a wide door to fraud. As to purchasers with notice, they cannot complain of fraud; and therefore, it is conceived, a voluntary assignment or settlement of chattels is clearly good against them.

Where a person makes a voluntary settlement or assignment of personal chattels and actually relinquishes the possession of them, there, it is presumed, a subsequent purchaser could not defeat such settlement or disposition, even though he was a purchaser without notice. Nor could he in the case of a settlement or assignment of choses in action where the securities are delivered.

It may be proper to enquire, whether a purchaser can have the benefit of the act of the 27th of *Eliz.* in any other case, than where he purchases from the same person who made the voluntary conveyance.

In Gilbert's Treatise on Uses, it is said, “that he who makes the fraudulent gift within the statute, must be the same person, who afterwards makes the sale of the lands.” This position, however, stands opposed by a resolution of the court in *Burrell's case*; (6 Rep. 72.) in which it was held;—that it was not necessary that he who sold the land should make the fraudulent estate; but, that whoever made it, the purchaser should avoid it.

These authorities are at complete variance with each other. In part, it is conceived, the latter is correct, but not to its full extent. Two cases may be conceived, and perhaps only two, where a purchaser may avoid a voluntary settlement although he does not purchase from the person who made it.

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after to the use of divers of his blood, with a future power, as after the death of *H.* or after such a day to revoke

There is, where a settlement is made with a secret trust for the settler himself. Upon his death, the estate, or rather the trust, descends upon his heir at law. The heir then sells the estate. Here, although the purchaser will acquire the equitable or beneficial interest without the aid of the statute, yet without its aid he will not acquire the legal estate. The legal estate however, being essential to his title, the act, it is apprehended, gives it to him; for unless it was held to do so a fair and honest purchaser might be defeated of his purchase.

The other case, which, it is conceived, falls within the operation of the act although the settler and the seller are different persons, arises where a person makes two voluntary settlements, and the person claiming under the latter sells to a purchaser for a valuable consideration who has no notice of the former. There can be no doubt, it is apprehended, but the former settlement is void against the purchaser notwithstanding he did not purchase from the person making it. There is an old case, indeed, which stands in opposition to this opinion; (*Dame Burgh's case*, Moore, 833, and see *Clarke v. Rutland*, Lane.) but the recent one of *Doe v. Martyn*, (1 Bos. & Pull. New Rep. 332.) may be adduced, it is conceived, as an authority in support of it.* Such an opinion too appears necessarily to result from the doctrine,—that a settlement voluntary in its creation acquires validity by the person claiming under it selling to a purchaser for a valuable consideration;—a doctrine which will be more particularly noticed in the sequel.

To entitle the purchaser, however, in the case last put, to avoid the prior voluntary settlement he certainly ought not to have any notice of it; for if he has, he must know, that the person claiming under it has a better right than the person from whom he purchases,—for of two or more volunteers, the first, it is well settled, is always preferred. It can, therefore, only be on the ground of his having purchased without notice of any prior right that he can possibly contend;—that the former voluntary settlement was fraudulent as against him.

The two cases which have been put, are the only ones, it is conceived, in which a purchaser can avoid a voluntary settlement where the settler and the seller are different persons: consequently, except in these cases, the resolution in *Burrell's case* cannot, it is apprehended, be supported. Admitting however, that there are, in fact, other cases, in which the act avoids voluntary conveyances and settlements, though the vendor and the settler are different persons, still it must be evident that the resolution in *Burrell's case*, cannot be supported to its full extent. If, for instance, a person made a voluntary provision by settlement for his younger children, certainly the act of the 27th of Elizabeth would not enable a purchaser from the settler's heir at law to defeat such provision:—and yet according to the resolution in *Burrell's case* it would. Not only, indeed, does the reason of the thing in such a case stand in opposition to the resolution in *Burrell's case*, but it also stands opposed by what was said by the court in the case of *Jones v. Pusey*. (1 Vern. 46.) In that case it was objected by the plaintiff, a mortgagee, claiming under a mortgage made by the settler's heir at law, that the settlement was but a voluntary settlement and therefore could never prevail against a purchaser without notice. "But as to that objection," the report says, "the court gave this clear answer." "It is true it was a voluntary settlement, and if it had been made by the person that mortgaged the lands, it should never prevail against a purchaser; but here the settlement was made by the grandfather, and the estate passed from him; but the mortgage was made by the father, who was never seised, nor possessed of the estate."

It may be proper to enquire whether voluntary limitations (as remainders or reversions), are good against subsequent purchasers for a valuable consideration where the settlement or conveyance which contains such limitations has its basis in a valuable consideration.

In *The case of St. Saviour's*, in Southwark, (Lane's Rep. 22. and 1 Cas. in Cha. 217.) the court expressed itself of opinion, that if a person, upon the marriage of one of his sons,—limited remainders to his other sons, that such remainders would be void against a purchaser. But this, it may be observed, was merely an opinion of the court, and no decision. And, besides, the court does not appear to have given any reason for its opinion. The case of *Roscarrick and Barton*, (and see *Beverly v. Gutacre*, 1 Roll. 305.) is one which supports the same side of the question. In that case, a person upon his marriage, settled an estate, (which was subject to a mortgage,) upon himself and his intended wife successively

* Query, whether the latter conveyance in *Doe v. Martyn*, can properly be considered as voluntary; it was expressed to be made in consideration of £475, which, for any thing that appears to the contrary, was the full value of the estate. But it seems, that the consideration was not actually paid. And, however, was given for it, which probably was intended to have been paid. But however this may be, the court certainly considered the latter conveyance as voluntary, which renders the case, it is conceived, an authority for the opinion in support of which it has been adduced.

voke it; and before the day he sell this land to a stranger for a valuable consideration; in this case, the first deed shall

sively for life; with remainders to his first and other sons in tail; with remainder to his brother in tail. After the marriage the mortgagee obtained a decree of foreclosure against the settler and took possession of the estate. The settler then died without issue; and his brother claimed a right to redeem, and brought his bill for that purpose; alledging, that as the bill of foreclosure was brought against the settler only, he (the brother) was not bound by the decree; the court however held that he was; and Lord C. J. Hale, (one of the commissioners of the great seal) observed that the limitation to the brother was *voluntary, and so no pretence to be supported against a purchaser.*

These are the only authorities which the Editor has met with which favor the opinion, that voluntary limitations *posterior* to limitations in tail supported by marriage or other valuable consideration, are *void* against purchasers.

In the case of *White v. Stringer*, (2 Lev. 105, and see *Lord Teynham v. Mullins*, 1 Mod. 109, in note.) the settler, upon the marriage of his eldest son settled an estate upon the son in special tail; with remainder to his (the settler's) second son in tail. The father afterwards sold the estate to a purchaser who had notice of the settlement and who took a collateral security against the remainder to the second son. Upon a question arising, whether the limitation to the second son was void against the purchaser under the act of 27th of Eliz.—the court held that it was *not*; and observed, that “it could never be imagined that the settler intended to deceive a purchaser after the determination of an estate tail which might endure for ever.” It is but proper to observe however, that the determination in this case is of less weight, as the court appears to have been somewhat influenced by the circumstance of the purchaser having notice of the settlement, and by his having taken a collateral security against the second son's claim.

The case of *Jenkins v. Keymis*, (1 Lev. 150.) is also an authority in favor of the validity of these voluntary limitations, when preceded by a valid limitation in tail.

In that case a tenant in tail general upon his marriage, suffered a recovery, and settled the estate to the use of himself and the heirs of his body by his intended wife, with remainder to the heirs of his body generally. He afterwards made a mortgage of the estate to a person who had no notice of the settlement. His wife died without issue, and he married again and had issue the defendant, against whom the mortgagee brought an ejectment to get possession of the estate. It was contended, on the part of the mortgagee, that the settlement was voluntary as to the issue of the second marriage, and consequently void as against him. The court however held that it was *good*, and Lord C. J. Hale, observed, “that the consideration of marriage and the marriage portion, would run through all the estates raised by the settlement; although the marriage was not concerned in them, so as to make them good against purchasers.” (See *Hardress*, 398.)

This however is not the true ground on which such voluntary limitations can be supported. In the case of *Osgood v. Storde*, (2 P. W. 255.) Lord Macclesfield observed, that the marriage and marriage portion only supported the limitations to the husband and wife and their issue; and that his Lordship was right in perfectly obvious it is conceived. The case of *Jenkins v. Keymis*, therefore, being determined on an erroneous principle, cannot be considered as having much weight on the point under consideration.

To the cases already cited in support of the validity of these voluntary limitations, may be added that of *Newstead v. Searle*, (1 Atk. 264.) a case indeed, which goes farther than any of the others, and in which it was held that a voluntary limitation concurrent with a limitation in tail supported by a valuable consideration was good against purchasers.

The above appear to be all the authorities upon the subject under consideration, and that those preponderate which maintain the validity of voluntary limitations, when *ulterior* to, or concurrent with limitations in tail supported by a valuable consideration is pretty evident; and these are the authorities, it is conceived, which are to be followed.

The true ground or principle however on which such limitations are to be supported, appears to be this.—viz. that they are free from fraud; and being so, they are not within the act of the 27th of Eliz. This opinion, if hastily taken up, may be thought to militate against a former opinion of the Editor's; viz. that voluntary settlements as such are within the meaning of that act. But it must be observed, that settlements voluntary in *toto*, were the settlements there spoken of, which must always be deemed fraudulent it is conceived; at least as against purchasers without notice. The conveyances however, which contain these voluntary concurrent, and ulterior limitations, are not conveyances voluntary in *toto*; on the contrary, they have their basis in a valuable consideration,—a consideration which would have been sufficient to have embraced the whole interest in the thing settled. This, therefore repels the presumption of fraud. And with respect to ulterior voluntary limitations, there is another circumstance which likewise repels it; viz. the improbability from their remoteness at the time of creating them, where expectant on an estate tail, that they will ever take effect in possession—a circumstance which discountenances the idea that fraud had any concern in producing them. Besides, the conveyances in which such limitations are contained, being, in fact, conveyances for a valuable consideration there is reason to contend, that instead of coming within the operation of the act of the 27th of Eliz. they fall full within the exceptions contained in it. Such voluntary concurrent and ulterior limitations must therefore be considered as good. In questions indeed between volunteers and purchasers

Ca. 6. 72.

shall be said to be fraudulent and void, as to him that shall purchase the land, to do him any hurt. And if one convey land with such a power of revocation (n), and after, with an intent to defraud a purchaser, make a feoffment to a stranger to extinguish the power, and after sell the land for valuable consideration to a stranger; in this case both the first and the second deed, as to the purchaser, shall be said to be fraudulent, and therefore void. And if there be grand-father, father, and son, and the grand-father makes a lease for one hundred years to the father, and the father, to prevent the drowning of the lease by the descent of the reversion to him, doth assign over the lease to certain friends of his, to the use of his son an infant under pretence to pay debts, the grandfather dieth, the father doth continue the occupation of the land, and maketh estates, and doth all acts as owner of the land, the son payeth no debts, and the assignment (albeit divers persons of quality were named assignees) was delivered to one of the assignees of mean estate in private, and after the father doth sell the land for valuable consideration; in this case this assignment shall be taken to be fraudulent and void as to the purchaser. And if the father make a fraudulent conveyance, and after continue the occupation of the land, and it descend to the son after the father's death, and he sell it for valuable consideration; in this case, the purchaser may avoid the conveyance made by the father, as well as if it had been made by the son himself, and that, whether the son be privy to the conveyance made by the father, or not (o). And if the fraudulent conveyance be made to the king, yet it is void as to a purchaser, as if it were made to a common person. And therefore if there be tenant in tail, the remainder in tail, or in fee, and he in the remainder, perceiving the tenant in tail doth intend to sell the land, and bar him by a common recovery, doth sell his remainder by deed inrolled to the king, and after the tenant in tail doth sell the land by common recovery for good consideration, in this case the purchaser shall avoid this deed to the king (p); whereby also it appeareth, that a fraudulent conveyance within this sta-

* P. 65.

no one could contend more zealously in favor of the latter than the Editor, at least where they are purchasers without notice: But as it seems to be understood that there is no principle of the common law which avoids voluntary conveyances as such, but only fraudulent ones, and as such limitations as we have been speaking of, cannot, it is conceived, be considered as fraudulent, and consequently neither affected by the common law or the 27th of Eliz. the Editor has felt himself compelled as it were to express himself in favor of them. It cannot be doubted however, that it would be more consonant to the principles of justice that every voluntary limitation in settlements, as well as settlements voluntary in toto, should give place to the claims of purchasers without notice.

It may here be observed, that to give the party claiming under a voluntary concurrent or ulterior limitation a preference over purchasers without notice, that the limitation must be contained in an actual final settlement and not in mere articles, and that the volunteer must have obtained the legal estate.

(n) See Mr. Sugden's Treatise on Powers, and the Treatise on Marriage Settlements, page 251, for other information relative to the subject of deeds or settlements which contain a power of revocation.

(o) See latter part of note (m), page 64, for cases where a purchaser from the son shall avoid a voluntary settlement made by the father.

(p) This does not appear to be a case protected by the act of the 32 Hen. 8. c. 36. which is pretty generally noticed in the chapter on Recoveries, and consequently the recovery will bar the remainder conveyed to the king, and if so, the statute of the 27th of Eliz. has nothing to do with the case. See latter part of note (r), page 42.

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tute may be by way of bargain and sale. And so was it ruled by the Lord Chief Justice Hyde in evidence to a jury at Guildhall, 3 *Car.* 1. And if there be a lease for years, and the lessor make a fraudulent conveyance in fee, and then for good consideration, maketh another lease to begin at the end of the former lease; this conveyance shall be void, as to the second lessee. And if *A.* make a lease to *B.* for years upon good consideration, and after he makes another lease to *C.* of the same thing, for the same term, to begin at the same time, upon good and valuable consideration, and *B.* doth not discover this, but drives this bargain with *C.* and his witness to this second lease, and the first lease is not excepted in the second lease; it seems in this case the first lease shall be void as to *C.* And in all these and such like cases, albeit the purchaser before he make his bargain have notice of the fraudulent conveyance, yet shall he avoid it as if he were ignorant of it (*q*). But such conveyances and deeds, made as before, shall never be said to be fraudulent and void, as against him that shall have the thing afterwards, if he do not give a valuable consideration for it. And therefore if one make a lease, that would be fraudulent and void as to such a purchaser, to *A.* and after make another lease *bonâ fide* to *B.* but without any rent or fine given for it; in this case, the first lease shall not be said to be fraudulent, as against the second lessee, and therefore not void. So if one covenant for the advancement of his heirs males, &c. to levy a fine of land by a day, to the use of himself for life, and after of his issue male; and before the day he make a lease that is fraudulent for many years, of purpose, and after he doth levy a fine accordingly; in this case this lease is good, and shall not be said to be fraudulent and void by this statute, as against the issue in tail. So if a man that is somewhat foolish, and given to waste, be persuaded to settle his lands upon some of his friends, of purpose to maintain himself with it; and after some of his lewd companions inveigle him, and get him for a small sum of money to convey it to them; in this case the conveyance first made, shall not be said to be fraudulent, as against these purchasers; and therefore it is good against them. And if one, that hath a term for sixty years if he live so long, make it away, and then he doth forge a lease for ninety years absolutely; and after by indenture, reciting this forged lease, for valuable and good consideration doth bargain and sell this forged lease, and all his interest in the land to *I. S.* in this case it seems that the first lease is not void, and that the purchaser shall have nothing but the forged lease (*r*).

M. 4 Jac.
Cowell &
Bart. case.

Per 2 Just.
Hill. 18 Jac.
B. R.

Co. 5. 60.
Co. 3. 83.

Co. super
Lit. 3.

(*q*) See observations on the point of the purchaser having notice of the voluntary or fraudulent conveyance, note (m), page 64.

(*r*) If the assignment of the good lease was a fraudulent or voluntary assignment, in that case, there can be no doubt but that the assignment of the forged lease "and of all the assignor's interest in the land," passed the term created by the good lease; at least if the purchaser had no notice of the voluntary or fraudulent assignment.

Stat. 3 H. 7, 4.
1 R. 2. ch. 3.
15 El. ch. 5.
Co. 3. 82.

A deed also made of any thing with intent and purpose to deceive and defeat creditors of their just debts and duties, is void also as against such persons. For it is provided to this purpose*, by other statutes, that all feoffments, gifts, grants, alienations, bargains, and conveyances of lands, tenements, hereditaments, goods, and chattels, or any rent, profit, or commodity out of land, made by fraud, or collusion of trust, to him that made the same, or otherwise with intent to hinder and delay, or put off, or put by creditors, or others, of their just and lawful actions, suits, debts, accompts, damages, penalties, forfeitures, heriots, mortuaries, or reliefs, shall be void, as against them to whom such things shall belong, and he may recover the thing notwithstanding; but all such as are made *bonâ fide*, and upon good consideration, are not to be accounted fraudulent by this statute(s). For the better understanding where-

2. To deceive creditors and others of debts and such like duties.

* P. 66.

of,

(s) The act of the 15th of Eliz. speaking only of *fraudulent* conveyances is held not to extend to *voluntary* conveyances as such. It is therefore, only where there is *FRAUD*, either *actual* or *presumed*, that a voluntary settlement can be defeated by the settler's creditors.

Actual fraud in voluntary conveyances or settlements can perhaps be but rarely proved. It is on the ground of *presumptive* fraud that they are generally impeached. The object of enquiry therefore is, *WHAT shall be considered such marks or indicia of fraud as to afford ground for presuming it.*

It appears to have been long settled, that the circumstance of *being indebted*, at the time of making the voluntary settlement or conveyance, is to be considered as an *inducium* of fraud. And on the presumption of fraud, arising from such circumstance, creditors whose debts arose *PRIOR* to the settlement may always defeat it: And with respect to *prior* creditors no circumstance, it seems, will be considered as repelling the presumption of fraud arising from being in debt. With respect however, to creditors whose debts arise *subsequent* to making the settlement, it is held, that if the settler was free from debt, and there were no fraudulent circumstances attending the settlement, it is perfectly good: (See *Halloway v. Millard*, 1 Mod. Rep. 414, and cases there cited) and even if the settler was not free from debts, yet it is held, that as to subsequent creditors, the presumption of fraud, arising from being indebted, may be repelled by other circumstances. Thus the circumstance of the debts, *THEN* owing being secured by mortgage has been held to do so. (*Stevens v. Olive*, 2 Bro. C. C. 92. *Lush v. Wilkinson*, 5 Ves. 384.) So, likewise has the circumstance of the settler making a provision by the settlement for the debts he then owed. (*Leech v. Leech*, 1 Cas. in Ch. 249. *George v. Milbank*, 9 Ves. 194. See *Nunn v. Wilmore*, 8 Durnf. & East's T. R. 521. and *Hungerford v. Earle*, 2 Vern. 261.) Therefore, where the presumption of fraud, arising from being indebted, is repelled by such circumstances as these, a voluntary settlement or conveyance, it would seem, will be good against subsequent creditors; unless indeed, there should be some other circumstance indicative of fraud besides that of being indebted; in which case, it is apprehended, the presumption of *FRAUD* would outweigh the counter presumption, and consequently the settlement be deemed void against subsequent creditors.

So where there is no circumstance to repel the presumption of fraud which arises from being in debt, *there*, it is apprehended, a voluntary settlement will be void against *subsequent* as well as against prior creditors. According however to Lord Rosslyn's doctrine in the case of *Montague v. Lord Sandwich*, (cited 12 Ves. 156.) *subsequent* creditors could not impeach such a settlement; his Lordship holding, that a voluntary settlement could only be impeached by those who were creditors at the time it was made. But although Lord Rosslyn held, that subsequent creditors could not invalidate a voluntary settlement, yet he held, that in case a voluntary settlement was impeached by antecedent creditors, that then the subject of the settlement would be thrown into assets and the subsequent creditors be let in. Supposing, however, his Lordship to be right in the opinion that subsequent creditors cannot impeach a voluntary settlement, then he was clearly wrong, it is conceived, in holding that they would be let in in case the settlement was impeached by antecedent creditors. If a voluntary settlement cannot be impeached by subsequent creditors, it must be on the ground that it is not fraudulent as to them; and if not, then, it is apprehended, they have no means of coming at the property comprised in it; for the act of the 15th of Eliz. declares that voluntary settlements shall be void *only* against creditors defrauded. Besides, let us look at the consequences of this doctrine of Lord Rosslyn's. If the settlement can only be impeached by prior creditors, is it not clear, that the payment of the subsequent creditors may entirely depend upon the antecedent ones? For if the settler can only induce the antecedent creditors to take no steps to impeach the settlement, then how are the subsequent creditors to get their debts? This doctrine therefore of Lord Rosslyn's, (notwithstanding the Master of the Rolls, in the case of *Kidney v. Coismaker*, (12 Ves. 155,) said, that he was disposed to follow it) appears to be a doctrine of a very questionable nature. In none of the prior cases does any such doctrine appear to be laid down. On the contrary, it is to be inferred from most of them, (see *Walker v. Burrows*, 1 Atk. 93. *Twyne's case*, 3 Rep. 81. *Beaumont v. Thorpe*, 1 Ves. 27. *Townshend v. Windham*, 2 Ves.

own; or make a conveyance of it to friends, to the intent they shall not be subject to the payment of his debts, having

So choses in action and money in the funds cannot be got at either by a legal or equitable process. (*Dundas v. Dutens*, 1 Ves. jun. 198. *Nantes v. Carrock*, 9 Ves. 189. *Rider v. Kidder*, 10 Ves. 368.) In the case of *Taylor v. Jones*, indeed (2 Atk. 600.) the Master of the Rolls directed stock comprised in a voluntary settlement to be sold and the produce to be applied in payment of debts. But however consonant this case may be to the claims of justice it appears to be over-ruled by the subsequent authorities above cited; and therefore a voluntary settlement of stock must also be considered as good, at least during the settler's life; but after his death his creditors may sue the persons claiming under the settlement as executors *de son tort*. (*Eduards v. Harben*, 2 Durnf. & East's T. R. 587. *Hawes v. Leader*, Cro. Jac. 271. *Stamford case*, 2 Leon. 223.)

Perhaps gifts of money cannot be over-reached by the act of *Eliz.*; at least that they cannot in a court of law is pretty clear; for a court of law, it is apprehended, can only follow the *specific thing*; and as the money may be spent, or even if it is not yet as it cannot be identified, how, it may be asked, is it to be got at? In equity however, the donee may perhaps be compelled to refund; or rather indeed to account for the money to the creditors. In the case of *Partridge v. Gopp*, (Ambl. 596.) Lord Northington decreed, that a sum of money which had been voluntarily given should be refunded. (But see the case of *Duffin v. Furness*, Cas. Temp. King, 77. which is *contra*.) In such a case the question probably may be; whether the maxim "*Equitas sequitur legem*" must prevail—and consequently, that if there is no remedy at law there is none in equity; or whether equity may not aid and assist the defect of the law? The Editor is inclined to the latter opinion, and consequently approves of the case of *Partridge v. Gopp*. The court, however, would probably not interfere if the sum was trifling and inconsiderable. In *Partridge v. Gopp*, Lord Northington observed, that the fraudulent intent was to be collected from the *magnitude and value of the gift*.

With the exceptions above mentioned all kinds of property it is apprehended, (which may be the subject of settlement at all,) fall within the act of the 13th of *Eliz.* Nor is there any distinction, it is conceived, between a voluntary settlement of real estate and a voluntary settlement of mere chattels. Fraud would be presumed in a settlement of the one whenever, under similar circumstances, it would be inferred in a settlement of the other.

From what was said by Lord Hardwicke in the case of *Townshend v. Windham*, it may perhaps be thought, that a distinction is to be made between a voluntary settlement in favor of a wife or child, and a voluntary settlement in favor of a mere stranger; and that when made upon the latter they are uniformly *bad*. His Lordship observed, "If there is a voluntary conveyance of real estate, or a chattel interest, by one not indebted at the time, though he afterwards becomes indebted, and that voluntary conveyance is for a child, and without any particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good."

Except this slight dictum the Editor finds no case in which a distinction has been taken between a voluntary settlement in favor of a child and a voluntary settlement in favor of a stranger. Indeed it would be difficult to shew on what ground a distinction can be maintained between a voluntary settlement on a wife or child and one on a mere stranger. Voluntary settlements as such, we have seen, are held not to be affected by the act of the 13th of *Eliz.* but only fraudulent ones. Let us suppose a voluntary settlement to be made upon a wife or child in which there is no circumstance indicative of fraud: can it possibly be contended, that if the same settlement had been made upon a stranger that it would have been fraudulent? On what ground, it may be asked, could it be so contended? Surely not from the mere circumstance of its being made on a stranger; for it must be obvious, that it is infinitely less likely that a man should be guilty of a fraud to benefit a stranger than to benefit his own children. Upon the whole, therefore, we need not hesitate in concluding, that wherever a voluntary settlement would be good against creditors if made upon a child, that under similar circumstances it will be equally good if made upon a stranger. So we may venture to affirm, it is conceived, that wherever a voluntary settlement would be bad if made upon a stranger, that under similar circumstances it would be equally bad if made upon a child.

It may not be amiss, perhaps, briefly to enquire to whom the act of the 13th of *Eliz.* affords its assistance. It is unnecessary to say that it affords its aid to the creditors of the settler. It has been held, indeed, that a creditor whose debt was CONTINGENT, when the settlement was made, cannot set aside a voluntary settlement. (*Nunn v. Wilmors*, 8 T. R. 521.) Lord Eldon, however, in the case of *Rider v. Kidder*, (10 Ves. 360.) appears to have entertained a contrary opinion; and that his Lordship's opinion is consonant to the true meaning of the act can hardly be doubted.

So it appears to have been held, that a creditor whose debt consists of damages obtained in an action brought for a personal wrong, cannot defeat a voluntary provision for the payment of other creditors; even though it was made pending the action and for the express purpose of giving them a preference. Thus in the case of *Luckner v. Freeman*, (Prec. in Cha. 105.) where the plaintiff brought an action against a Mr. Montagu for criminal conversation with his wife: Pending the action, Mr. Montagu assigned his estates to trustees, upon trust to pay several debts mentioned in a schedule and such others as he should name. The plaintiff recovered £5000 damages and brought his bill to set aside this deed as fraudulent. The court however held that it was not fraudulent, because the plaintiff was no creditor at the time of making the deed; and that although it was made to prefer the defendant's real creditors to this debt, (the damages) yet as it was a debt only founded in *malificio* it was conscien-

ing bound himself and his heirs by any speciality; or to the intent that a warranty and assets shall not bind his son for

dous to prefer his other debts before it. [Generally speaking a mere voluntary provision for the payment of debts, may be defeated by the creditors who do not choose to acquiesce in it. (See *Turbuck v. Marbury*, 2 Vern. 510. *Lord Paget's case*, 1 Lev. 194.) But if any creditor is a party to a deed which makes a provision for the payment of his own and certain other specified debts, such deed, if free from indications of fraud, will be good against creditors whose debts are not specified. (*Eastwick v. Callaud*, 5 T. R. 42.)]

The settler's creditors, it may be observed, are not the only persons to whom the act extends its assistance. But this indeed, must be perfectly obvious;—for the act declares, that conveyances made to defraud "creditors and others" of their "lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs," shall be void. These words are so comprehensive that it may hardly be going too far to say, that every person who has a demand against the settler, which the fraudulent settlement stands in the way of his recovering, may resort to the act for assistance. (For cases to which the act has been held to extend, although the party seeking its aid was not, in the common acceptance of the term a creditor of the settler's, see *Pouncefoot's case*, cited 3 Rep. 82.—*Turrell v. Tipper*, Latch. 222. *Cresswell v. Cooper*, Dyer, 351. *Jones v. Ashurst*, Skin. 357. *Ford v. Sheldon*, 12 Rep. 1. *Self v. Madox*, Vern. 460.)

Although one species of creditor as much as another has it in his power, in the settler's life-time to set aside a fraudulent settlement, and that whether the subject of such settlement is real or personal estate, yet after the settler's death a voluntary settlement of real estate can only be impeached either by specialty creditors or those of a higher nature; for simple-contract creditors, after the debtor's death, have no means of coming at his real property. By an act indeed, of the 47th of the present reign; (ch. 74.) the simple-contract creditors of a person who at the time of his death was subject to the bankrupt laws, may, in a court of equity, set aside a fraudulent settlement of real estate after his decease. The public are principally indebted to the late Sir Samuel Romilly for this act; and had the same liberality pervaded the whole legislature as actuated the enlightened individual just mentioned, the benefit of it would not have been confined to the creditors of persons in trade, but would have been extended to the creditors of every one.

As the heir is liable to his ancestor's specialty debts to the extent of the real assets which have descended upon him, in case he should make a fraudulent settlement of such assets: it would clearly be void both against his ancestor's creditors, (see *Apharry v. Bellingham*, Cro. Eliz. 330.) and his own. (See *Gooch's case*, 5 Rep. 60, and *Dyer*, 149.)*

With respect to fraudulent settlements of personal estate, there is no doubt but simple-contract creditors have in all cases the power of defeating them after the settler's death. And persons in possession of personal estate under a voluntary and fraudulent settlement may be sued after the settler's death as executors *de son tort*; (*Hawes v. Leader*, Cro. Jac. 271, by the name of *Hawes v. Cookson*, Yelv. 197. *Edwards v. Harben*, 2 T. R. 587.) And they may be so, although there is a rightful executor. (*Edwards v. Harben*, *ubi sup.*)

It must be obvious, that estates held under voluntary settlements, where fraudulent, may be followed by the settler's creditors into the hands of the volunteer. If they could not the act of the 13th Eliz. would be little better than a mere nullity. But although it is clear, that estates derived under voluntary settlements, may be followed into the hands of the volunteer, yet it may be proper to notice that they cannot, generally speaking, be followed into the hands of purchasers from the volunteer. (But for further information on this subject, see what is said on voluntary conveyances becoming good by matter *ex post facto*, in the Treatise on Settlements, page 238.)

The act of the 13th of Eliz. only makes fraudulent settlements void as against persons whose debts, &c. are delayed. After the demands upon the settler are satisfied the settlement is clearly good. (*Hawes v. Leader*, *ubi sup.* *Curtis v. Price*, 12 Ves. 103.)

A person, we will suppose, has a general power of appointment over real or personal property and is also entitled to it under the ownership. If he makes a voluntary settlement, in exercise of his power, there can be no doubt but it must be considered as fraudulent and void against his creditors in every case in which it would have been so considered had it been made under the ownership. But where a person with a general power of appointment and no interest under the ownership makes a voluntary settlement, there it will be difficult, it is conceived, to find any ground on which to contend that such settlement is void against creditors. The creditors in such a case cannot say, that they

* Before the act of the 3d William & Mary, c. 14, a devisee was not liable to the deviser's debts in respect of the estate devised, consequently till the passing of that act a voluntary settlement by the devisee could not possibly come within the act of the 13th of Eliz. so far as concerned the deviser's creditors: as to his own creditors it certainly did. Whether a voluntary settlement by a devisee must now be considered as void against the deviser's specialty creditors, and consequently within the act of Eliz. is a point which the Editor finds nowhere determined, and upon which a difference of opinion may perhaps be entertained. It may be observed however, that the act of the 13th of Eliz. being a remedial act ought to be construed liberally in favor of creditors, and consequently be held to extend to cases to which its spirit and import clearly apply although the very cases did not exist when the act was made.

for other land, or the like; in this case, this conveyance shall be void, as to them that should have relief upon this land

are defrauded by the settlement; for the property which is the subject of it would have been completely out of their reach had the settlement never have been made; and consequently, it is apprehended, the settlement must be good. The Editor is aware that this opinion is at variance with the authorities on the subject, and that there are several cases in which it has been decided, that if a man with a general power of appointment, voluntarily exercises such power, either by deed or will, that the subject of the power shall be liable to his creditors, notwithstanding he has no interest under the ownership. (*Lord Townshend v. Windham*, 2 Ves. 1. *Pack v. Bathurst*, 3 Atk. 269. *Lascelles v. Lord Cornwallis*, 2 Vern. 465. *Bainton v. Ward*, 2 Atk. 172. *Thompson v. Tourne*, 2 Vern. 619. *Troughton v. Troughton*, 3 Atk. 656. *Holmes v. Coghill*, 7 Ves. 499. and 12 Ves. 206.) It will however be difficult, it is conceived, to assign a satisfactory reason for this. It is only on the ground of fraud that a settlement under the ownership is considered as void against the settler's creditors. What fraud there can be in an appointment (where the appointor had no interest under the ownership,) is not easy to discover; for if no appointment had been made the creditors could not have come at the property; and how they can prove that the appointment was made to defraud them, (which they must do, it is apprehended, to set it aside) does not very clearly appear. Upon the whole we may venture to conclude, that an appointment under a general power of appointment, (where the appointor has no interest under the ownership,) cannot be defeated by the settler's creditors*.

In advancing this opinion the Editor trusts it will not be thought that he wishes to narrow the creditor's right to recover his debts: quite the reverse. But whilst he is an advocate for the creditor, he is not regardless of an adherence to principle;—for by a departure from principle, laws are rendered vague and uncertain, and consequently litigation and contentions are greatly multiplied. It has been said, indeed, and the observation has been frequently reiterated, “that it is no matter what the law is, *provided it is known*.” But it may be remarked, in reply to this observation, that if the law does not rest upon principle, but merely upon forensic decisions which are inconsistent with it, that it will not be so likely to be known as if it did rest on principle. For principle being intelligible, is much more likely to be known and remembered than decisions which are at complete variance with it. And this consideration alone is a sufficient reason, it is conceived, for making an adherence to principle desirable.

Having endeavoured to point out the law relative to voluntary conveyances, or rather the decided cases on the subject, the Editor trusts he shall stand excused if he expresses his total dissent from the doctrine—that a voluntary settlement is good against subsequent creditors provided the settler was not indebted when he made it; a doctrine which does no little violence to the claims of justice. And he expresses his dissent from this doctrine with the less hesitation, there being several authorities against it.

Thus in *Stanford's case*, (2 Lev. 223.) where a man made a deed of gift of part of his goods and afterwards died; *Dyer*, Ch. J. held, that the gift was void against the settler's creditors both by the common law and the 13th of *Eliz*. It does not appear from the report of this case, either that the settler was indebted when he made the deed or that positive fraud was found; and consequently it must be inferred, that Lord C. J. *Dyer* considered it as fraudulent and void from the mere circumstance of being VOLUNTARY. And in an anonymous case in *Rolle's Reports*, (2 Roll. 175.) a voluntary settlement of a lease was held to be void against the settler's creditors. In this case also it does not appear, either that the settler was indebted when he made the settlement or that there was positive fraud in it, but it was considered as fraudulent, it is conceived, from the mere circumstance of being voluntary.

The cases of *Fletcher v. Sidley*, (2 Vern. 490.) and *St. Amand v. The Countess of Jersey*, (1 Com. 255.) may be also mentioned as similar authorities to those just noticed. So likewise it is conceived, may the case of *Taylor v. Jones*, (2 Atk. 601.) in which the Master of the Rolls appears to have principally rested his decision upon the broad ground—that voluntary settlements as such, were void against creditors. The cases already mentioned, may be considered as *express decisions*;—that voluntary settlements, as such, are void against creditors. And besides these cases, the dicta of some eminent judges to the same effect may be noticed. Thus in the case of *Nunn v. Wilmore*, (8 Durnf. & East's T. R. 528.) Lord *Kearney* observed, “with regard to the statute of *Eliz*. that act contains, no doubt, wise provisions, as applicable to the cases to which it was meant to apply: and if this deed were either actually fraudulent, or voluntary, from which the law infers fraud; then the consequences insisted upon by the plaintiffs, would follow, and the defendant would be obliged to repay this money.” And again I admit that if this were a VOLUNTARY deed the law says it is FRAUDULENT.”

So in the case of *Partridge v. Gopp*, (Ambl. 596.) the language of Lord *Northampton* is worthy of remark. “I think,” observes his Lordship, “no man has such a power over his own property as to dispose of it so as to defeat his creditors, except for consideration.” “The statute extends to a

* Where a person with a general power of appointment, but without any interest, becomes a bankrupt, his creditors, it is apprehended, would be entitled to the property whether he had exercised the power or not.

land by descent; and especially when the conveyance is made after the suits begun; and more especially when any judgment

"cases, except where there is a good consideration and bona fide. Blood has been held not to be a good consideration." And in the case of *Gilham v. Lock*, (9 Ves. 612.) there is an expression of the Master of the Rolls, which may be likewise noticed. His Honor observes, "where a father has made no provision for his family, his wife and children, he is under a moral obligation to do so; yet settlements after marriage are VOLUNTARY against creditors." By which his Honor must be understood to mean—that settlements after marriage were fraudulent against creditors.

In addition to the authorities already brought forward in support of the opinion, that a voluntary settlement is fraudulent and void against all creditors, without at all regarding whether the settler was indebted at the time of making it or not, it may be observed, that the judges have frequently held, that acts of parliament made in suppression of fraud, should be liberally construed: (see *Doe v. Rutledge*, Cowp. 705. *Cadogan v. Kennett*, ib. 432. and see 3 Rep. 82.) But surely a construction which may almost be said to open a door to the commission of fraud cannot be considered a very liberal one. That holding a voluntary settlement to be good, if the settler is not indebted when he makes it, is, in fact, holding out an invitation to fraud, is but too obvious; for does not such a doctrine, in effect, amount to saying; "only be free from debt at the time you make a voluntary settlement, and afterwards get as much into it as you please; for by making a voluntary settlement, when free from debt, you effectually put your property out of the reach of your creditors?"

That fraud and dishonesty should be repressed as much as possible, no one will attempt to deny; would not, then, holding every voluntary settlement to be void against creditors, materially promote so desirable an end? It cannot be doubted that it would.

It is not meant to be contended, that a voluntary settlement should be considered as void against creditors merely on the ground of its being VOLUNTARY; (though there may be some reason to think, that the act of the 13th of *Eliz.* avoids it on that ground only;) but on the ground of being FRAUDULENT—a ground, on which the statute clearly makes it void; as perhaps, does the common law also. * It is true, it could not be considered as void on the ground of fraud, unless fraud was either positively proved or there was reason to presume it. But what is contended for is,—that although fraud may not be positively proved, yet that there is reason to presume it in every voluntary settlement which hinders the payment of the settler's debts. And when the promoting of good faith amongst mankind, and the suppression of fraud are the great objects to be obtained by it, surely presumption might be well pushed to its farthest limits. Where a voluntary settlement therefore stands in the way of paying the settler's debts, it may fairly be inferred to be fraudulent, notwithstanding he was out of debt at the time of making it. The very circumstance of afterwards getting into debt, (to an amount his other property would not satisfy) may well justify the presumption of fraud; for by incurring debts which he knew he had not the means of paying he has proved himself to be a man of dishonest principles. Would it then be carrying presumption too far in such a case to say,—that the settlement was made with a view to put his property out of the reach of those debts he intended to contract? It is apprehended it would not. In voluntary settlements or conveyances if the result is injustice, it does not seem to be carrying presumption beyond its due bounds to take it for granted that the object was injustice; and therefore if a voluntary conveyance or settlement would deprive the settler's creditors of their debts, (by which it would be productive of injustice towards them) it may be fairly presumed, that to deprive them of their debts was one of the settler's objects in making it.

In voluntary settlements upon a wife and children, a great stress appears frequently to have been laid (as an argument in support of such settlements) that the settler is under a natural and moral obligation to provide for them. True: but he is not under an obligation to provide for them at the expense of a higher obligation—that of paying his debts. Neither is he under the necessity of making a provision for them by deed: He might make it by will; as in that case his creditors would be paid.

* Lord Coke says that the statute of the 13th of *Eliz.* is only declaratory of the common law; (*Co. Litt.* 290 b.) and there are authorities from which it would appear, that at the common law even fraudulent settlements were not void against all creditors but only against prior ones. (*Twyne's case*, 1 Rep. 83 a. *Upton v. Bassett*, Cro. *Eliz.* 444. *Dyer*, 294, 5.) If such was the doctrine of the common law, and if the statute is merely declaratory of it, then the statute does not, even on the ground of fraud, make every voluntary settlement void against all creditors. But it is apprehended, that the statute must be considered as something more than declaratory of the common law. The word "declare" in the act, (on which Lord Coke founds his opinion) is too slight a ground to go upon. The statute, it is apprehended, intended the act to reach cases which the common law did not extend to; and at least to make FRAUDULENT conveyances void against all creditors. If this opinion is an erroneous one and the statute is in reality only declaratory of the common law, and if, at the common law, fraudulent settlements were only void against prior creditors, then on what ground is the doctrine before noticed to be maintained, viz. that a voluntary settlement is void against subsequent creditors when made by a person indebted at the time?

judgment is had upon the suits against him that doth make the deed. And so also is the law for goods. And therefore if one be indebted to *A.* £20, and to *B.* £40, and be possessed of goods to the value of £20, and *A.* doth sue the debtor for his £20, and, hanging this suit, the debtor secretly makes a general deed of gift of all his chattels real and personal to *B.* in satisfaction of his debt, and yet doth afterwards continue the occupation, and use the goods as his own, and after *A.* getteth judgment and execution; in this case, the deed of gift to *B.* shall be said to be fraudulent, and therefore void as against *A.* So if in this case he give all his goods to *B.* in satisfaction of his debt, and before any suit begun by *A.* with any express or implicit trust, as to the intent that *B.* shall be favourable to the

Co. 3. 80. 83.
Bro. Dome.
20. Plow. 54.

There is an observation of the Master of the Rolls, in the case of *Taylor v. Jones*, (2 Atk. 602.) particularly worthy of attention, viz. "though I have always a great compassion for a wife and children; yet, on the other side, it is possible, that if creditors should not have their debts, *their wives and children may be reduced to want.*" There is no sound reason for shewing more favor to a voluntary settlement on a wife or child than on a mere stranger:—on the contrary it is entitled to less; for, as has been before observed, a voluntary settlement upon a wife or child is more likely to be **FRAUDULENT** than a voluntary settlement upon a mere stranger; because a man is more likely to be guilty of a moral wrong to benefit those to whom he is bound by the ties of nature than to benefit those to whom he has no such tie. Another argument may be also resorted to, as a reason against leaning in favor of voluntary settlements upon a wife or children; viz. that the wife and children may be actually enjoying a benefit from the debts the settler had contracted; and is it at all reasonable that they should both enjoy the settler's property and that of his creditors?

It may further be observed, that to consider *all* voluntary settlements as fraudulent and void against the settler's creditors, might not be without a beneficial influence in imposing a check upon extravagance and prodigality. For if a man knows that his wife and children must be the sufferers from his extravagance he may not launch into it; whereas he possibly might do so if he could make a voluntary provision for them which could not be affected by his debts. Another advantage would also result from it, which is, that it would put an end to that litigation and contention, which the doctrine on the subject, as it appears to stand at present, must necessarily create. Upon the whole, every thing that can be urged appears to be in favor of holding that *all* voluntary settlements should be considered as fraudulent and void against the settler's creditors, without at all regarding whether they were creditors before or after making the settlement.

The clause of the act of the 13th of *Eliz.* which imposes a penalty for *alienating* the lands comprised in fraudulent conveyances, may, perhaps, be thought incompatible with holding, that *every* voluntary settlement should be deemed fraudulent and void against the settler's creditors; for that if the doctrine were once so established, no innocent volunteer could ever sell or dispose of the estate without exposing himself to penalties. This however, it is apprehended, is not the case; for he may dispose of it as soon as he ought to do so without being subject to any penalty; viz. as soon after the settler's death as he can adduce proof of the settler's debts being paid: for on the true construction of the penal clause it is clear that the volunteer, after all demands on the settler are satisfied, is liable to no penalty for alienating the estate. This must be obvious not only from the circumstance of the penalty being imposed merely for the sake of preventing alienations *to the prejudice of creditors*, (and if the volunteer does not sell till all the debts are paid there are no creditors to prejudice) but also from the circumstance of one half of the penalty being given to the party injured by the alienation. Now if all demands on the settler are satisfied previous to the alienation there is no one entitled to that half of the penalty. Upon the whole there appears to be nothing in the penal clause which affords any sound reason against holding—that every voluntary settlement should be deemed fraudulent and void against *all* the settler's creditors, and without at all regarding whether the settler was indebted at the time he made it or not.

There is one case indeed, in which it is conceived a voluntary settlement may be considered as good against creditors, and that although the settler was actually in debt at the time he made it: As where the settler, immediately previous to making the settlement was seized in *tail* of the estate which is the subject of it. (See *Broun v. Durlon*, 3 Atk. 632.) So long as the entail would have continued had it not been destroyed to make the new settlement, the settler's creditors (except creditors under a commission of bankrupt) could not have come at the estate except for the settler's own life; and consequently it can hardly be supposed that the settlement was made with a view to defraud them. If indeed, the settler had the immediate reversion in fee, in himself, and he saw there was a likelihood of the estate tail determining with his own life, in that case, the settlement certainly might appear from a fraudulent motive.

Before concluding this subject it may be necessary to notice, that voluntary limitations in settlements concurrent with or ulterior to a limitation supported by a *valuable consideration*, must be considered as good against the settler's creditors. See *Treatise on Settlements*, page 248.

debtor

debtor; or that if the debtor provide the money that he shall have the goods again; or that he shall suffer the debtor to enjoy and use the goods and pay him as he can; in these, and the like cases, the deeds shall be said to be fraudulent and void, for howsoever it be made upon good consideration, yet it is not made *bonâ fide*. So if one in consideration of natural affection, or for no consideration, give all his goods to his child, or cousin, *bonâ fide*, this shall be a void as to the creditors. *Et sic de similibus*. So if one give all his goods and chattels to his executor in his life-time by deed of gift, this shall be said to be fraudulent, and shall be void as to creditors. And albeit those to whom the deed of fraud is made, know nothing of the fraud, yet is * the deed fraudulent in that case also, as well as where they are privy to it. If after a commission of bankrupt be sued out the debtor make a deed of gift of all his goods to one of his creditors in satisfaction of his debt; in this case this deed shall be void, as against the rest of the creditors and as to the commissioners, and they may order it with the rest of the estate notwithstanding (t). But if *A. bonâ fide* and for valuable consideration mortgage his land, whereof he hath a term of years, to *B.* upon condition that if he repay the money to *B.* a year after, that he shall re-enter, and *B.* doth covenant with *A.* that he shall take the profits of it until that time, &c. *A.* doth not pay the money, and *B.* hoping that he will pay it in time, doth suffer him to continue in possession and take the profits of it two or three years after, and in the interim judgment is had against *A.* upon a bond, and execution awarded; in this case execution shall not be made of this lease; for this deed of mortgage shall not be said to be fraudulent as to the creditor: for when a conveyance is not fraudulent at the time of the making of it, it shall never be said to be fraudulent for any matter *ex post facto* (u).

If *A.* be seized of the fifth part of the manor of *B.* and *B.* of the sixth part, and *M.* cometh to *A.* to buy his part, and after *M.* saith to *A.* my counsel tells me I cannot safely buy of you unless *B.* join, and after *B.* doth grant a rent charge of £15 *per annum* out of this manor to *C.* her son, and the heirs of his body, in consideration of natural affection, (and this was about 10 *Jac. C.* being then but about three years old) with proviso, that if *D.* (whom *B.* did then intend to marry) grant to the said *C.* the like rent of £15, and for the like estate, out of £20, land by the year, of the land of *B.* then the said grant to be void, and after the said *A.* bought the sixth part of the said manor, of *B.* and *D.* her husband, being intermarried, and after *A. B.* and *D.* her husband join in the grant to *M.* in this case it was ruled that this grant to *C.* was not fraudulent and void (x). If one doth hold his land, to pay a heriot at the death of every one that dieth tenant in fee

* P. 67.

Co. 2. 25.

By the two
Judges of
Assize Arg.
5 Car. in
Com. South.
Lady Lam-
bert's case.

Mich. 19
Jac. Co. B.
Müller and
Pet's case.

10. 56, 57.

(t) See Treatise on Settlements, page 273, on the subject of settlements and other dispositions of property made by persons who become bankrupts.

(u) But a deed fraudulent in its creation may become good by matter *ex post facto*. But for further information on this subject, see Treatise on Settlements, page 238.

(x) The grant of the rent-charge being a voluntary one, and the conveyance to *M.* being for a valuable consideration the grant of the rent-charge was clearly void against *M.* by virtue of the act of the *Ediz.*; at least if *M.* had no notice of the rent-charge.

simple.

simple, and he infeoff his son and heir in consideration of natural affection, and marriage to be had between the son and *I.* and the son (to prevent the dower of his intended wife during his father's life) makes a lease for forty years unto his father, if his father live so long, and afterwards the marriage is had, the father payeth the rent, the son does suit of court for the land, and after the father dieth; in this case this lease shall not be said to be fraudulent as to the lord to deceive him of his heriot, because it was made to another end.

3. To deceive lords of their wardships, &c.

* P. 68.

A deed also made to defeat the King or other Lord of his wardship shall be void, as to a third part of the thing conveyed. And therefore, if any tenant that holdeth of the King, or any * other Lord make a feoffment or other conveyance of his land, to defeat and defraud the King or Lord of his wardship, primer seisin (y), or any other benefit appointed and preserved for the Lord by the statutes of 32 and 34 *H. 8.* it shall be void, as to a third part thereof against the King or other Lord, who shall notwithstanding have their wardship and other benefits, as if none such were made. As if such a tenant by deed infeoff his lineal or collateral heir within age, or make a lease for life the remainder to his heir, or make a gift in tail the remainder in fee to his heir, or make a feoffment on condition that he shall re-infeoff his heir at his full age, or make a feoffment for the payment of his debts, or preferment of his wife and children, or infeoff another to the intent that he shall take the profits till he have an heir male, and then to re-infeoff him: all these are fraudulent and void, as to a third part of the land, and as against the King or other Lord, in respect of the benefit they are to have of and by the land. But no conveyance in these cases shall be said to be fraudulent and so void, for two parts of the land. And if one make a feoffment of land to two (whereof his heir is one) and their heirs, for money or other valuable consideration; this shall not be said to be a fraudulent conveyance of any part. So if such a joint-tenant make a feoffment of his moiety to a stranger. † And in cases where the feoffment is fraudulent for a third part 94. as before, if the feoffee die or make a feoffment over *bonâ fide* before the death of the ancestor, in these cases the deed is become good again, and the collusion gone. If a man for fear of debts convey his lands to friends, with condition that upon payment of £10, they shall convey it to those whom he shall appoint, in this case the conveyance shall not be said to be fraudulent as to the King or other Lord, for it was done to another end (z), and therefore it is a good conveyance against all men but the creditors. Where deeds shall be void in part or in all, for want of enrolment, attornment, livery of seisin, or the like, see afterwards.

Stat. 52 H. 3.
c. 9. 34 H. 8.
ch. 5. Co. 6. 76.
Lit. Sect. 59.
Plow. 49. Co.
8. 164. 9. 129.

† Dyer 2. Co. 2.
94.

Dyer 268. Co.
10. 57.

(y) These rights are taken away by the act of the 12 *Car. 2. c. 24.*

(z) But notwithstanding it was done to another end, yet so far as it stood in the way of the king or other lord recovering his demand, it would be void.

Ca. 11. 27. 5.
119. Dyer 39.
361. Perk. Sect.
133. 135. Kelw.
162. Fitz. Re-
lease 27. 14 H.
8. 25. Bro.
Fitt. 9.

If a deed that is well and sufficiently made in its creation, shall be afterwards altered by rasure, interlining, addition, drawing a line through the words (though they be still legible) or by writing new letters upon the old, in any material place or part of it, as if it be in a deed of grant, in the name of the grantor, grantee, or in the thing granted, or in the limitation of the estate, or if it be in an obligation, when the word [heirs] shall be inserted, or the sum increased, or in the date of either, or the like; be the same either by the party himself that hath the property of the deed, or any other whomsoever, except it be by him that is bound by the deed, and be the same with or without the consent of him to whom it is made or doth belong, in this case, and by either of these means, the deed hath lost its force and is become void (a).

And if the alteration be made by the party himself that owneth the deed, albeit it be in a place not material, and that it tend to the advantage of the other party, and his own disadvantage, yet the deed is hereby become void. But if the alteration be made by the party himself that is bound by the deed in any material or immaterial part thereof; or if a stranger without the privity or consent of the owner of the deed shall make any such alteration in any part of a deed not material; as if it be a deed of a grant containing a lease for years, and there be inserted between [To have and to hold] and [for thirty years] these words [from henceforth;] or, if it be an obligation and there be inserted between [*obligo me*] and [*per presentes*] these words [*et executores meos*] in both which cases those words are needless and without any fruit at all; hereby the deed is not hurt, but it remaineth good notwithstanding (b). But if the alteration be before the delivery of the deed, be it whatsoever, or by whomsoever, it will not hurt the deed (c). And herein it must be observed, that then a rasure, &c. is most dangerous, and the deed thereby most suspicious, when it is in a deed poll, and there is but one part of the deed; and when the rasure or other alteration is in any material part of the deed; and when the alteration makes to the advantage of him that doth own the deed, and to the disadvantage of the other that made it; and when there doth appear some other thing to be written before; and when there is no other part of the deed, recital, defeasance, or other matter to which this may be compared, and that may make it appear to be before the delivery; and when there be other parts of the deed, or other matters whereunto this being compared doth not agree in that part wherein the alteration is; and when the deed hath been in the smoke, or any such like means hath been used to cover the alteration. And in these cases the matter

6. Where a deed good in its creation may become void by matter *ex post facto*. And what will make such a deed void or not.
1. By rasure.

P. 69.

Perk. Sect.
121. 124. Bro.
Fitt. 6. Perk.
129. 127. 128.

(a) A. and B. sealed and delivered a bond to C. and after the name and addition of D. was interlined, he also sealed and delivered the obligation, and it was held to be a good obligation of all three.

Ev. 35. But query, whether an additional stamp would not be necessary in such a case.

(b) Executors and administrators are bound without being specially named, and consequently the addition of such words would make no difference in the effect or operation of the deed; but the heir is bound unless specially named, and consequently the addition of the word *heirs* would vary the nature of the deed. The interlineation however after the execution of a deed of any words which vary the effect or operation of the deed will in no case, it is conceived, effect its validity; see note 707; and see page 71, note (m).

(c) See page 53, note (l).

was anciently used to be tried by the judges upon the view of the deed; but it is now used to be tried by jurors, whether the rasure, or other alteration, were before the delivery of the deed or not (*d*). Co. super Lit. 225.

2. By breaking or defacing of the seal.

And if after the sealing, delivery and perfection of a deed, the seal thereof happen to be broken off, or to be utterly defaced, so that no sign or print thereof can be seen, or it appeareth to have been broken off and it is glued, or the wax new heated and set on again, or the label of the deed hath been broken off from the deed, and is sewed on again, or the deed is now sealed with other wax; be the same by whatsoever means, or whomsoever, unless it be by him and his means that is bound by the deed; in these cases, and by either of these means, the deed is become void (*e*). But if any piece of the seal remain fixed to the deed, and there be any print left upon that piece, the deed doth continue good. And if after a seal of a deed be broken off, the party that sealed it, do seal and deliver *à* it *de novo*; by this means, it seems the deed is become good again. Dier 59. Co. 11. 28 5. 23. Dyer 112. Perk. Sect. 133. 136. Bro. Ob. lig. 83.

* P. 70.

3. By redelivery or by cancelling of it.

And if a deed be delivered up to the party that is bound by it to be cancelled and it be so; or if he that hath the deed doth by agreement between him and the other cancel the deed; by either of these means the deed is become void (*f*). But if an obligee deliver up an obligation to be cancelled, and the obligor do not afterwards cancel it; but the obligee happen to get it again into his hands and sue the obligor upon it, the obligor hath not any plea to avoid it, for the deed remains still in force (*g*). Trin. 38 EL. Co. B. Dier 112.

4. By disagreement.

And if an obligation be delivered as an escrow to a stranger, to be delivered to the obligee on certain conditions: or to a stranger to the use of the obligee, and when this is after tendered to the obligee he doth refuse it and disagree to it; or if an obligation be made to a feme covert, and her husband disagree to it; in all these cases the deed is become void (*h*). And like law is of other deeds in divers such like cases. But the party bound by the deed may not in these cases plead *non est factum* to the deed. Co. 3. 26. 5. 119. Dier 5. 167.

Agreement.

And in these cases when the party hath once by his agreement made the deed good, he cannot afterwards by his disagreement make it void: and when once, by refusal and

(*d*) When a lawful deed is rased, whereby it becomes void, the obligor may plead *non est factum* because at the time of the plea it is not his deed, 11 Co. 27 a. See further in what cases rasure, and interlining will vitiate a deed, Vin. Abr. Faits (T.) Com. Dig. Falt (F. 1.) Roll. Ab. S. Faits (T. U) and see *supra*, page 53, note (1).

(*e*) Where the seal is destroyed by accident the deed is still good if there is proof that it was once sealed. In order to destroy the operation of a deed by breaking off the seal, or by cancellation, the seal must be done *eo animo*; and with respect to deeds which pass an estate of freehold the rule now seems to be, that the estate is not divested by breaking off the seal or by cancellation, even where done with that express view. See Gilb. Eq. Ca. 233. and Bull. Nisi Pri. 267. See *supra*, page 53, note (1).

(*f*) See last note on the subject of cancellation.

(*g*) See accordingly Cro. Eliz. 483. and further as to the effect of cancelled deeds at law, what they shall be relieved against in equity; and what remedy may be had against persons cancelling or destroying deeds, Vin. Abr. Faits (X. 2. 3. 4.)

(*h*) So if a lease or conveyance is made to a feme covert she may disagree to it when sole, or if it dies under coverture her heir may disagree to it. It is said, that if a conveyance is made to two joint-tenants and one of them disagrees that the other shall have the whole, 4 Lev. 207. but 5 Rep. contra. Where however the conveyance is to two or more as tenants in common and one of them disagrees the conveyance will be void as to his share. On the subject of disagreement or disclaimer, see further, *supra*, page 53, note (1).

disagreement

disagreement he hath made the deed void, he cannot by agreement or acceptance afterwards make it good.

Crom. Jur. 29.
40. Bro. Fait,
38.

A deed also good in its original creation may be afterwards damned or avoided by sentence and order of a court; and this is usually done in the Star Chamber (i) and in the Chancery; and it is when it appeareth that the deed was obtained by some fraud, force, circumvention, or such like practise, or when it doth appear to be forged, or the like (k).

5. By judgment of a court.

Vacat of a deed.

Ca. 11. 27.
14 H. 8. 27, 28,
29.

For the answer of this question these differences must be observed. 1. When a deed is void *ab initio*, and when it doth become void by matter *ex post facto*. 2. When the deed which is void in part from the beginning, is entire, and when it doth consist of several clauses: and when it doth consist of several clauses, when the several clauses are absolute and distinct, and when they are several, and yet the one hath dependency upon the other. For if any of the covenants of an indenture, or the conditions of an obligation be against law, and the rest of the covenants or conditions be good and lawful; in this case those that are against law, and the deed as to that part, are void *ab initio*; and the rest, and the deed as for that part, are good *ab initio* (l). So if three distinct obligations are written upon a piece of parchment, and the one of them only is read to the obligor, and he being an illiterate man seal and deliver the deed; in this case this is a good deed, for that which was read, and void for the rest *ab initio*. But if an obligation be for £20, and it be read to the obligor an obligation of 20s. this is void for the whole *ab initio*.

7. When and where a deed may be good in part and void in part. Or good against one person and void against another, or not.

Ca. 11. 27.
Kew. 70. 3 E.
30, 31.

If a deed be read as containing the grant or gift of an estate tail, and a letter of attorney to give livery of seisin, and in that sense the party doth seal it, and in truth it is a feoffment and conveyance of an estate in fee-simple; in this case, albeit the letter of attorney were truly read, yet, because it hath dependence on the estate, it is void for all.

P. 71.

Ca. 11. 28.
Fitz. Feoff-
ments and
Fairs, 57. 47 E.
2. 1.

If a man be indebted to me £20, on a contract, and £100, on an obligation, and he pay me this £20, and I am to make a release for it, and the intendment of the release is no more: and it is so read to me being an illiterate man, but in truth it is a general release; in this case it seems it is good for so much as it is intended and was declared, and void for the rest.

See 27.

If the condition of an obligation be altered by rasure, &c. the obligation also is hereby become void, because the condition and obligation are one deed; but if the rasure, &c. be in the defeasance of an obligation, this will not make the obligation void (m).

H. 8. 25, 26.
Ca. 11. 28.

If a deed contain divers distinct and absolute covenants, and any of these covenants be altered by addition, inter-

(i) The jurisdiction of the Court of Star Chamber, abolished by the act of the 16 Car. 1. c. 10.

(j) See *supra*, page 53, note (m).

(k) The provisions of a deed may be good in part and bad in part, or good as to some of the parties and bad as to others, see *Treatise on Settlements*, page 370.

(l) A bond conditioned to pay £100 by six payments of £16. 13s. 4d. on the 3d of October in every year, till the full sum of One pound was paid. A stranger, after the execution of the bond, inserted the word "hundred" before the words "one pound" and it was held, that the sum being manifest, the insertion of the word "hundred" did not hurt the bond, 5 Taunt. 707.

lineation, rasure, or the like, by this means the whole deed, and not that part only, is become void (*n*).

If there be divers grantors, obligors, &c. named in a deed, and one of them only do seal the deed, this is a good deed as against him that doth seal, and void as to all the rest that do not seal. And if divers enter into covenants by a deed severally, and the seal of one of them is broken from the deed; in this case the deed is good still as to all the rest, but void as to him. But if an obligation, or the covenants of a deed, be joint and not several; or joint and several, and the seal of one of the obligors or covenantors is broken; or the obligation, or covenants, be altered by rasure or the like; hereby the whole deed is become void (*o*).

Co. 5. 23. 11.
28. 3 H. 7. 5.

If I be bound in an obligation to a Monk and *I. S.* this deed is void as to the Monk but good as to *I. S.* So if a Monk and I be bound to another; this is good as against me, but void as against the Monk. And so it is in case of a grant.

14 H. 8. 29.
Perk. fo. 2.

By a power of revocation, or a condition, a deed may be made void in part and continue in his force for another part. And therefore it seems in the usual case where a deed is made upon condition, That if such a thing be or be not done, the deed shall be void, or these presents shall be void; that in these cases the whole deed and all the covenants therein contained are void (*p*). But if the frame of the condition be, that upon such a thing to be, or not to be done, it shall be lawful for the feoffor, lessor, &c. to re-enter, or that the demise shall be void, without more words; in these cases the estate only, and those covenants that are incident thereunto, as for quiet enjoying and the like, and the deed as to * that part only is void: and for other covenants that are collateral, and have no dependence upon the estate, that part of the deed doth remain in force and is good still; for a man may grant two acres upon condition to re-enter into one of them. If it be intended that the whole deed shall be void, the best way is to use these words, [then these presents, and every thing therein contained, shall be utterly void.]

Co. 1. 173.
Dier 127. See
in Leak's
Numb. 13.

• P. 72.

g. How and to what time a deed shall have relation: and when it shall begin to take effect.

All deeds do take effect from, and therefore have relation to, the time, not of their date, but of their delivery: and this is always presumed to be the time of their date, unless the contrary do appear. And hence it is, That if a statute be acknowledged the 26th day of *May*, and the conusee make a release of all demands dated the 25th day, and deliver it the 27th day; by this release the statute is discharged. And that if the defeasance of a statute do bear date before, and the delivery of it be after, the statute; the conusor may shew this, and take advantage of it in avoidance of the statute. And that if a writing be dated in the minority of an infant, and be sealed and delivered by

Co. 2. 4. 5. 3 H.
7. 26. Plow.
491. Dier 507.
315. Fitz. Feoff.
ments and Fals.
87. 63. 95.

(n) Query of this, if the addition, interlineation, &c. did not alter the effect or operation of the deed see supra, page 69, note (b), and also see last note.

(o) See, as to breaking off seals, &c. supra, page 53, note (l).

(p) It is different in the case of a proviso in the nature of a condition in conveyances to use or what is generally called a conditional limitation. See instances of such limitations Fearn's Con.

Fitz. Feoff. and
Fairs Barre.
147.

Co. 5. 1.

Co. 3. 35, 36.
18 H. 6. 9. 27
H. 6. 7. Plow.
344.

Co. 10. 92.
super Lit. 267,
317, 225, 231,
574. Lit. Sect.
275.

him when he is of full age, this is a good deed and will bind him. And that if a release be supposed to be made by a husband to bar a duty due to the wife, and it be dated during the coverture, but in truth it is sealed and delivered by the husband before the coverture; this shall not bar the wife: the time therefore of delivery of a deed is material in all these and the like cases, and this is always to be tried by a jury. And hence it is also, that if the next presentation to a church be granted to two several persons, by several deeds, of several dates, and the deed that beareth the last date be first delivered; in this case, he to whom this deed is made, shall have the presentation, and not the other, whose deed albeit it be dated first yet is delivered last. And hence it is also, that if a lease be made for years, to begin from henceforth, or *à confectione presentium*, or *à die confectionis*; this lease shall be said to begin from the time of the first delivery, and not from the time of the date (q).

And where deeds have a kind of double delivery, as in case of a delivery as an escrow, there they shall take effect from, and have relation to, the time of the first delivery, or not, *ut res valeat*: for if relation may hurt, and for some cause make void the deed, (as in some cases it may,) there it shall not relate. But if relation may help it, as in case where a feme sole deliver an escrow, and before the second delivery she is married, or dieth, in this case, if there were not a relation, the deed would be void, and therefore in this case it shall relate (r). So if one disseise me of two acres of land in *D.* and I release to him all my right in my lands in *D.* and deliver it to an estranger as an escrow, &c. until a time, and before that time he disseise me of another acre there; in this case this release shall not by relation extend to this other acre to bar me * of that also. But as to collateral acts there shall be no relation at all in this case. And therefore if the obligee release before the second delivery, the release is void, and will not bar the party obligee of the fruit of his obligation.

* P. 73.

If a man that is party or privy in estate or interest, or one that doth justify in the right of one that is such a party or privy, shall plead a deed in any court; although he claim but parcel of the original estate, yet in this case, he must shew the original deed to the court: and the reason of this is, to the end that the legal part of the deed (the trial whereof belongeth to the Judges) may approve itself; i. e. that it may be seen whether the composition of words be sufficient in law or not; and then that it may appear whether the estate be with condition, limitation, or with power of revocation, &c. to the end that if there be any such thing in it, and there be no other part of it, the other party may

9. When and where a deed must be shewed in court. And how long it shall abide there. And who may take advantage of it.

(q) A lease to commence "from the day of the date," was, in the case of *Pugh v. The Duke of Leeds*, (Comp. 714.) held to commence on the day of the date, or immediately from the delivery of the deed. The lease was granted under a power which required the leases to be granted so as to take effect in possession, and it was held that the power was well pursued. In the case just noticed however the Court seemed to say, that whether the words "from the day of the date" should be construed exclusive or inclusive of the day of the date might depend upon the intention of the parties.

(r) See accordingly *Jennings v. Bragg*, 10. Eliz. 446. So also it is of a deed of feoffment, and letter of attorney therein to make livery, by a man *sua memorie*, which is delivered by the attorney when the feoffor is *non compos mentis* yet it is good, because it hath relation to the authority before.

take

take advantage of it; and then that it may appear to be without rasure, or interlining, and the like; and also that it may appear to be well sealed and delivered, (the trial whereof doth now belong to the country)(s). But strangers to estate, that are neither parties nor privies, shall not be compelled to shew the deed, though they make use of it. And when a deed is thus shewed in court, it must remain in that court, all the term wherein it is shewed, in the custody of the *custos brevium*; and at the end of the term, if the deed be not denied, the law doth adjudge the possession of the deed in him to whom it doth belong. But if the deed be denied, then it is to be kept there until it be determined. Also when a deed is shewed in court, the adverse party may take any advantage by it that it will afford him; as if a feoffment be made by deed poll on condition, and the feoffee doth break the condition, and the feoffor doth enter, and the feoffee doth sue him, and makes his title by that deed, the feoffee may take advantage of the condition.

10. Where one may say his deed was delivered at another time, or in another place.

Any man that hath occasion to use or plead a deed, may set forth the delivery thereof to be at any time after the date of the deed; and in some cases he must do so, if he will have any advantage by it. As if he plead a release to an obligation, and it beareth date before the obligation; in this case he must aver that it was delivered after, or it will not avail him. But a man may not in pleading set forth the delivery of a deed to be before the date of the deed. And yet if it be so that a deed be dated after the time of the delivery of it, the deed is good; and therefore if he that doth use such a deed do plead and set it forth as a deed made before the time of the delivery, and the party that made it plead *Non est factum* to the deed, a jury upon the trial may find the truth of the case: but if he by his pleading set forth the deed to be delivered before the time of the date, then the jury is concluded, as well * as the party himself; for a jury is estopped to find any thing contrary to that which is apparently admitted in the record. In debt brought by an executor, the defendant pleaded the release of the testator, which did bear date after the death of the testator, but he did aver the delivery of it in the life-time of the testator and the court did not allow of this plea.

Dier 315. 12
H. 6. 1. Co. 2,
4, 5.

Estoppel.

* P. 74.

12 H. 6. 1.

Sometimes antiquity added the place where the deeds were made, as *datum apud B.* and this was in disadvantage of him to whom the deed was made; for if the deed be in general, and without this addition, he may alledge the deed to be made where he will. An obligation made beyond the seas may be sued here in *England* in what place the obligee will, and if it bear date at *Burdeaux* in *France*, it may be alledged to be made in *quodam loco vocat. Burdeaux* in *France*, in *Islington* in the county of *Middlesex*, and there it shall be tried: for whether there be such a place in *Islington* or not, it is not traversable in that case.

Co. super Lit.
6.

Co. super Lit.
261.

Non est factum; Quid. And where this may be pleaded to a deed, or not.

Non est factum is an answer to a declaration whereby a man denieth that to be his deed whereupon he is impleaded.

(s) See Gilbert on Evidence, page 366, Loft's edit.

If any deed or writing be used against a man in any court, and it want writing, sealing, or delivery, or it be not sealed, written, and delivered as before is set forth, the party that is sued upon it, or against whom it is pleaded, may plead this plea to it. So also if a deed by any alteration of rasure, &c. become void; in this case the party may plead this plea to avoid it. So also where a deed doth become void or lose its virtue by the not reading, or not true reading of it to an illiterate man, or by refusal or disagreement, as in the cases before, the party may plead this plea to avoid it. But in all cases where the deed is voidable, and so remaineth at the time of the pleading; as if an infant, or man of full age by duress, seal and deliver a deed; or if an obligation be well sealed and delivered by two, and the deed be joint, and the obligee sue one of them; in these and such like cases, the party bound by the deed may not plead *Non est factum*; for in the first and such like cases he must avoid it by special pleading, with conclusion of judgment *si actio*, &c. and in the last he must plead in abatement of the writ, &c. And if an obligation or any other deed be by any special act of parliament made void, the party that is bound by it cannot plead this plea of *Non est factum* to it; but he must avoid it by special pleading of the matter, and taking advantage of the statute, and so with conclusion of judgment *si actio*, &c. (t).

And now we come to the exposition of deeds.

(t) On the loss of deeds, see Gilbert on Evidence, 98. 100, and Maddock's Prin. of Ch. 23.

CHAP. V.

EXPOSITION OF DEEDS.

IT is further to be observed, that deeds for the most part consist of these things, viz. the premises, *habendum*, *tenendum*, *reddendum* or reservation, condition, warranty, and covenant. And in the premises there is sometimes a recital, and sometimes an exception contained: but all these are not essential parts of a deed; for a deed may be good, albeit it have not all these parts, or it be not so formal and orderly drawn and made.

1. Premises.
Quid.

The premises of a deed are all the foreparts of the deed before the *habendum*. And yet this word is sometimes taken for the thing demised, or granted, by the deed. And the office of this part of the deed is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted, either by express words, or by that which by reference may be reduced to a certainty, and the exception, or thing to be excepted, if there be any. And, in this part of the deed is the recital (if there be any in the deed) for the most part contained. And herein also is sometimes (though improperly) set down the estate.

Co. super Lit.
6. 7. Co. 11.
51. 2. 55.
Plow. 196.

2. *Habendum*.
Quid.

The *habendum* of a deed, is that part of the deed which doth begin with, *to have and to hold*. And this doth properly succeed the premises. And the office hereof, is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use. And herein also is sometimes, though needlessly, set down again the thing granted. But the deed that doth usually consist of all these parts, may be good notwithstanding some of them be omitted, and it be not so formally made. For an estate may be made by a deed without any *habendum* at all. As if one give or grant land to another and his heirs, without any more words in the deed; or if one give or grant land to another, and limit no estate, without any *habendum* in the deed, and seal and deliver this deed, and make livery accordingly; in both these cases the deed is good, and in the first case an estate in fee simple is made, and in the last case an estate for life is made. And if the name of the grantee be not contained in the premises, yet if it be in the *habendum*, it may be good enough. As if one give or grant land, *habendum* to B. and his heirs, and he is not named in the premises, yet this is a good deed to make an estate in fee simple(a).

Co. super Lit.
6. 7. 10. 107.

Where a deed is good, notwithstanding some seeming fault in the premises or in the *habendum*.

And

(a) This is to be understood of the case where no one is named in the premises, for in deed operating at common law the general rule is, that where a person is named in the premises no other person

Plow. 152. And yet if the thing granted be only in the *habendum*, and
 Dier 96. Perk. it. And therefore if a man grant black acre only, in the * P. 76.
 sect. 251. premises of a deed, *habendum* black acre and white acre;
 white

person can take an immediate estate by the *habendum* where he is not named in the premises. Thus, where lands are given in the premises to the husband, *habendum* to him and his wife, the wife will take nothing because she is not mentioned in the premises. *Winsmore v. Hobart*, Hob. Rep. 313, and see 2 Rol. Abr. 67. (But see contra, *Brookes v. Brookes*, Cro. Jac. 434, et seq. Barr. Rep. 286; and see 3 East's T. R. 115.)

So where A. possessed of a term, granted all his estate and interest therein to B. *habendum* to himself (A.) and his wife for their lives, and after their decease to B. The first grant to B. was held to be good, but the *habendum* to A. and his wife was held to be void. *Goshawks v. Chiggell*, Cro. Car. 154.

There are however some exceptions to the rule just noticed. Thus, if lands are given in frank marriage, the wife who is the object of the gift may take by the *habendum* though she is not named in the premises. See 1 Inst. 21 a. So a person not named in the premises may take an estate in remainder by the *habendum*. Hob. 313. Burr. 283. So a grant to A. *habendum* to him and his wife for their lives *successive*, gives a remainder to the wife. *Wheaton v. Sugg*, Cro. Jac. 372. *Fisher v. Wigg*, Ld. Raym. 627. In the case of a lease it has been held, that a person may take though only mentioned in the *habendum*. 1 Inst. 7 a. note 3. And it is said, that if the lessee is named both in the premises and *habendum*, he may take though he is not even a party to the lease. Cro. Jac. 564.

In conveyances to uses, persons not named in the premises may take by the *habendum*. *Sommes's case*, 13 Rep. 55.

Where the *habendum* is repugnant to, or inconsistent with the premises the *habendum* is void, and the grantee will take the estate given in the premises.

Thus, if lands are given in the premises to A. and his heirs, *habendum* to A. for his own life, or to him and his executors and administrators for a term of years, the *habendum* is void, and the grantee will take the estate in fee. Plowd. 153. 2 Rep. 23 b. But if lands are given in the premises to one and his heirs, *habendum* to him and his heirs *pur autre vie*, here there is no repugnancy between the premises and the *habendum*, and the estate limited by the *habendum* is good. (See *Pilsworth v. Pyett*, T. Jones, 4.) In a conveyance operating under the statute of Uses, if lands are given in the premises and also in the *habendum* to one and his heirs, to the use of him for life with remainders over, the party takes a mere life estate, and the remainders over are good.

In cases where such an estate is limited by the premises as would require livery of seisin to pass it, and an estate is limited by the *habendum* which only requires the delivery of the deed in order to pass it, the estate limited by the *habendum* will be good provided the deed merely is delivered and no livery of seisin made. Thus where a person by indenture granted and devised lands to Ann Baldwin and Anthony her son and to the heirs of the said Anthony, *habendum* to them for a term of years: no livery was made according to the indenture; and it was resolved that as livery of seisin was necessary to perfect the estate in fee limited by the premises such estate did not pass for want of livery; but as to the estate for years limited in the *habendum* it was good presently by the delivery of the deed. *Baldwin's case*, 3 Rep. 23.

There are cases, however, where the *habendum* is allowed to enlarge, restrain, or explain the premises; for it is a rule of construction, that where a deed first speaks in general words and afterwards descends to special words, if the special words agree with the general words the deed shall be intended according to the special words; (*Mortimer's case*, 8 Rep. 154 b.) For although the nature of the estate given in the premises cannot be entirely altered by the *habendum*, yet it may be qualified by it; as in that case there will be no absolute repugnancy between the premises and the *habendum*.

Thus, where no express estate is limited in the premises but an estate for years is limited in the *habendum*, here the *habendum* will qualify the life estate which by construction would otherwise have passed by the premises, and the party shall take an estate for years only. 8 Rep. 154 b. 1 Inst. 183 a.

So, if lands are given in the premises to A. and his heirs, *habendum* to him and the heirs of his body, he will take only an estate tail, because the *habendum* qualifies and restrains the general import of the word "*heirs*" to the lineal descendants of the grantee. 8 Rep. 154 b. Cro. Jac. 476. Co. Litt. 21.

If a lease be made to two persons *habendum*, the one moiety to one and the other moiety to the other, the *habendum* qualifies the premises and makes the lessees tenants in common, whereas by the premises they were joint-tenants.

white acre will not pass by this deed (b). But if the thing, newly added, be implied in the thing granted by the premises of the deed, as being an incident thereunto, or otherwise; or it be the same thing, and expressed in other words only; in these cases the premises and the *habendum* may stand together. As if one grant a manor, *habendum* the manor, with the advowson appendant to the manor; or if one grant a reversion of land, by the name of a reversion, in the premises, *habendum* the land itself; in both these cases the deed is good, and the advowson, and reversion, will pass (c). So also if livery of seisin be made of the thing newly added, in this case perhaps it might pass by the livery (d); and if the thing granted be left out in all, or in part, in the *habendum*, yet the grant is good. And therefore if one grant land to A. *habendum* to A. his heirs, &c. or if one grant white acre and black acre to A. *habendum*

The estate given in the premises may be enlarged by the *habendum*. Thus, where an estate is given in the premises to the grantee for life, *habendum* to him and his heirs, the grantee will take an estate in fee. See Poph. 138.

Where the premises and the *habendum* of the deed are equally clear and explicit, the former will not be controlled by the latter but both will be allowed to have an operation, it being a rule of law that a deed shall be construed in such manner that each part of it may be effectual if they can stand together.

Thus if lands are given in the premises to a person and the heirs of his body, *habendum* to him and his heirs, he will take an estate tail with a fee simple expectant thereon. 2 Rep. 55. 3 Lev. 339. 9 Rep. 476. And therefore when the deed at first contains special words and afterwards concludes in general words, both words, as well general as special, shall stand. Poph. 138. Even a gift to a person and his heirs in the premises *habendum* to him and the heirs of his body, has been held to pass an estate tail with a fee simple expectant. As where lands were given to husband and wife, and their heirs, *habendum* to them and the heirs of their bodies, it was held that the grantee took an estate tail with a fee simple expectant: but Mr. Hargrave has observed that this case was attended with circumstances particularly shewing an intention to pass both, for there was a reservation of tenure to the lord paramount which could not be if only an estate tail passed to the donee and the reversion had remained in the donor, for then the tenure must have been of the donor.

The *habendum* may sometimes destroy the effect of the grant and render a deed void which without the *habendum* would have been good: as when a grant is made to A. for his life, or to A. and his heirs without any *habendum*; here the grantee would, in the one case take an estate for life, and in the other an estate in fee; but, by the addition of an *habendum*, to hold from a day to come or from a future event, the *habendum* would destroy the effect of the grant, and the deed could not operate either under the grant or under the *habendum*; (*Baldwin's case*, 2 Rep. 23. 1 Inst. 183.) for in deeds operating at common law, an estate of freehold cannot either by the *habendum* or otherwise be made to commence in *futuro*, except by way of remainder expectant on a prior vested estate of freehold: A term of years *de novo* however may be made to commence in *futuro* without its having any antecedent estate. So by deeds operating under the statute of Uses, an estate of freehold may be limited to commence in *futuro* without the limitation of an antecedent estate of freehold, where such an estate remains vested in the grantor.

(b) Though new parcels cannot be introduced by the *habendum*, yet the *habendum* may regulate and distribute the parcels—as to hold one moiety to one person and his heirs, and the other moiety to another and his heirs. So the *habendum* may regulate the time that the estate is to commence in possession, as in the case of a demise for a term of years, to hold from a day, or from an event to come. In speaking of the parcels, it may be proper to observe, that if a deed correctly describes land by its quantities and occupiers, describing it to be in a wrong parish will not vitiate the deed, but the lands will nevertheless pass. 5 Taunt. 207.

In a grant from the crown of all those messuages called A. and all lands thereto belonging or therewith demised lately belonging to the priory of B. the description is sufficient, and the messuages will pass, although at the time the possessions of the priory were surrendered to the crown the property was only known by the description of the four closes in A. and the land was not built upon. *Gennings v. Lake*, Cro. Car. 168.

(c) But it is not so in the case of an advowson in gross.

(d) By the statute of Frauds, 29 Car. 2. c. 3. a writing is now necessary to the validity of a feoffment.

Lit. 1. Co.
super Lit. 46.
Co. 6. 35.
Terms of the
law, tit. As-
signs.

white acre to A. and omit black acre; yet these deeds are good, and all that is contained in the premises of the deed doth pass in both cases. And if a feoffment be made to one, *habendum* to him and his heirs, without the word *assigns*; this is a good feoffment, and the estate thereby made is assignable: as where a lease is made to one, his executors and administrators, without the word *assigns*, this is a good lease and assignable. So if one grant land to A. *habendum* to him for one hundred years; or *habendum* to him and his assigns for one hundred years; these are as good leases as the lease that is made by these words *habendum* to A. his executors, administrators, and assigns, for one hundred years. So if a lease of land be made to A. *habendum* the land to him and his heirs for one hundred years, this is a good *habendum*, and the word [heirs] is void, and it shall go to his executors, &c. As also where land is granted to A. *habendum* to him and his successors for one hundred years; this is a good lease, and the word [successors] void, for it shall go to executors, &c. And if a lease be made *habendum* for years, and say not how many years, this is a good *habendum*, and a lease for two years.

A recital is the setting down, or report of something done before.

3. Recital.
Quid.

Co. 1. 45.
Dier 77.

When a man is to take any new estate from the King of a thing whereof there is any estate in being, there the former estate if it be good and of record, must be rehearsed and recited in the deed, or else the second grant will not be good. But in case of a common person there needs no such recital; neither when a man is to derive an estate out of a former, or assign over a term of years, is it needful there should be any recital of the former estate in being.

4. Where it is
needful; or
not.

Co. 4. 74.

If one recite or rehearse an estate made for term of years, and * then after grant over that term to another, and mistake in the recital; this mistake may make all void. As if a *fieri facias* come to a sheriff to levy a debt, and he by writing recite that the defendant hath a term of years, and doth suppose it to begin 1 May, 2 Jac. when in truth it doth begin the 20th of August, and then sell the same term; in this case this sale is void. But if he add withal these words in the deed [and all the interest that the defendant had in the land]; or if he make sale of it for a certain number of years only; this grant may be good notwithstanding the misrecital.

5. Where mis-
recital will
hurt a deed;
or not.
* P. 77.

Dier 93. 160.

If one recite a former lease to be made such a day to I. S. and then make a new lease to begin after the end of the former lease, and mistake the date of the old lease; in this case the deed is good notwithstanding this mistake.

H. 7. 3. Fitz.
Grant.

If one grant a reversion, and in reciting the lease in possession mistake the date of it only and recite all the rest truly; this will not hurt the grant. No more than where a man doth recite that such land came to him by forfeiture, and then doth grant it by name; for in this case albeit it did not come to him by forfeiture but by surrender, yet

yet this mistake will not hurt. And yet in case of the King such a misrecital may make the grant void (e).

If

(e) Although recitals are not an essential part of a deed, yet they are frequently very proper for the purpose of elucidating transactions, and of affording an evidence at a future day of facts and circumstances connected with the title; as of such facts and circumstances as the marriage of parties; the number of children of such marriage; the payment of portions; the deaths of parties and at what times; whether they died intestate or not; whether without issue or not; who were their heirs at law; in the case of joint tenants or joint trustees which was the survivor; in what court and at what time wills were proved, &c. After the lapse of thirty years from the date of the deed containing such recitals, the recital, if the possession has gone agreeably to the recital, is considered as *prima facie* evidence of the fact.

Earlier deeds are sometimes recited in conveyances. Where however such deeds are delivered to a purchaser, there appears to be little or no necessity, in any case, for a recital of them in the purchase deed. If indeed the purchase deed is made under a power, then it is usual to recite the power. In the case too of assignments or surrenders of terms of years it is usual to recite the deed creating the term so far as relates to the term. But where a term has been once assigned to attend the inheritance, there seems no reason to recite any thing more than the deed creating it and the deed last assigning it and what is necessary to shew that the parties who make the present assignment are competent to do so.

When title deeds are not delivered to a purchaser, there a pretty full recital of them may be sometimes useful, though where he takes attested copies of them and has a covenant to produce them such recitals do not appear to be of much importance.

Where a trustee conveys, the deed creating the trusts and the subsequent acts, if any, which may have altered the objects of the trusts should be stated. Where deeds are recited, generally speaking, they should be recited according to their dates, but when there are several distinct transactions to be stated or recited, it is the best to go through the recital of one chain of transaction before the other is begun upon. Where a lease and release are recited, they should be recited by their united operation, and the expression should be that by those indentures the lands in question were conveyed to one his heirs and assigns for ever; or otherwise according to the circumstances of the case. So if a fine or a recovery formed a part of the recited conveyance, the united operation of the fine or recovery and of the deed declaring the uses may be stated; as that by indentures of lease and release of such dates, made between such parties, and by a fine levied as of such a term in which such persons were plaintiffs and such persons defendants; or by a recovery suffered in such a term in which such a person was the defendant, such a person was the tenant, and such a person the vouchee, the lands were limited to certain uses, stating them as far as necessary.

In reciting marriage articles in a settlement made in pursuance of them, they should be recited pretty fully and with great accuracy. In the recital of powers it seems unnecessary to recite any thing further than what is necessary to shew that the intended exercise of the power is warranted by it.

Where a power is intended to be exercised, and the uses to take effect in default of exercising the power are limited to other persons than those to whom the power is given and who are not made parties to the deed, there it seems quite unnecessary to make any mention of those uses.

Though it is usual in deeds exercising powers to recite the creation of the power, yet it is well settled, that an appointment is perfectly good without any recital or mention of the power, or without any declaration that it was intended to exercise the power; for if the act done be of such a nature that it can have no operation unless by virtue of the power, it will be presumed, that to exercise the power was the intention of the parties.

As connected with the present subject the most important point of enquiry appears to be, in what cases recitals will either amount to an evidence of the fact recited, or will operate by way of estoppel. Where such facts, as that A. died leaving B. his heir at law; that C. survived D. with whom he was joint-tenant, or facts of a like nature are recited in a deed which is upwards of thirty years old, the recitals themselves, if the possession of the property has gone agreeably to the recitals, are considered as evidence of the facts. In titles to old leaseholds for years, the question frequently occurs, whether the recital of the original lease, where such lease is lost, affords sufficient evidence of the creation and existence of the term. Where the term is upwards of sixty years old, and where the possession has gone agreeably to the recitals, some professional gentlemen are of opinion that it is, and that the title cannot be objected to from the circumstance of the lease being lost. The danger however in such a case appears to arise from the possibility that the recital may be false as to the length of the term, or as to the period of its commencement. Suppose it appeared from the recital that the term was for two hundred years; but that from the original lease, which afterwards came up, or from a counterpart in the hands of the lessor, it should appear, that the term was in fact but for one hundred years, could it be contended that a person who purchased on the faith of the false recital would have a right to hold after the expiration of the term really granted? It is conceived it could not; and if so, then it must be clear that the title, where the original lease is lost cannot be safely accepted. Recitals, it is conceived, are in no case of themselves and unaccompanied by circumstances, evidence of the facts recited. Where in an old deed it is recited that A. was heir at law to B. credit is given to the statement because the possession has gone accordingly. So where it is recited in an

Dier 50. 87.
376.

If I grant to *I. S.* all the lands in *Dale* which I purchased from *I. D.* or which came unto me by descent from *I. D.* or I give all my goods to *I. S.* which I have as executor to *I. D.* and in truth I have no such lands, or goods, but I had them by some other means, or of some other person; in these cases, and by this mistake, the deed is void. But if I grant to *I. S.* all my lands in *Dale* by name, as white acre, which I purchased of *I. D.* and in truth I did purchase them of another, in this case this mistake will not hurt the deed. So if I grant twenty load of wood in *Dale*, in the great wood which I had of the grant of my father, and in truth I had it not of the grant of my father, but of the grant of another, in this case the grant is good. But of this matter see more in Grant, numb. 4. part 5.

Plow. 361. 195.
Dier 59. Perk.
sect. 625. Co.
super Lit. 47.
3 H. 6. 43.

An exception is a clause of a deed whereby the feoffor, donor, grantor, lessor, &c. doth except somewhat out of that which he had granted before by the deed. And this doth most commonly and properly succeed the setting down of the things granted, and is made by one of these words *except*, *preter*, *salvo*, *si non*, or such like. And hereby the thing excepted is exempted, and doth not pass by the grant, neither is it parcel of the thing granted: as if a manor be granted excepting one acre thereof, hereby in judgment of law that acre is severed from the manor. But this may be in any part of the deed, and so hath it been resolved. *Hil. 17 Car.*

B. R. Fregun-
del's case,
Perk. sect. 62,
&c.

In every good exception these things must always concur, 7. What shall be said a good exception; or not. 1. This exception must be by apt words. 2. It must be of part * of the thing granted, and not of some other thing. 3. It must be of part of the thing only, and not

• P. 78.

old deed that portions have been paid, credit is given to the recital because it is highly improbable that the parties entitled to them would suffer them to remain so long unpaid. Or where it is stated in an old deed that of two trustees *A.* was the survivor, credit may be given to the statement because it is to be presumed that the fact was ascertained at the time and because no reason appears why the parties should state a falsehood upon such a point. In short, it is conceived that a recital is in no case evidence merely from the circumstance of its being contained in an old deed, but because there are circumstances which render it probable that the recital is correct. But in the recital of a lease there appears to be no circumstance which tends to prove the duration of the term. As to the possession, that only tends to shew that the term is not actually expired, but it affords no evidence that there are a hundred years or any other certain period yet to come.

In modern deeds recitals are not considered as evidence of the facts recited, but such recitals will, in certain cases, operate by way of estoppel, and preclude the parties from shewing the contrary. Thus the recital in a release of the lease for a year, will preclude the releasor and those claiming under him, from averring that there was no such lease. (*Ford v. Lord Gray*, 6 Mod. 44. and see 2 Lev. 108, 109.) But persons who are neither parties to the release, or claim under those who are will not be bound by the recital of a lease for a year in a modern release. Such a recital however in a release upwards of thirty years old would be considered as evidence that a lease for a year had existed; or even without such a recital it would be presumed that there had been a lease for a year.

It seems to be doubted whether the issue in tail, or those in remainder or reversion, will be estopped by the recital of the lease for a year, where the tenant to the precipe for suffering a recovery has been made by lease and release. Where however, twenty years have elapsed from the time of suffering the recovery, the act of the 14 Geo. 2. c. 20. sect. 5, will render the recovery good, notwithstanding the lease for a year may be lost or not appear. See *Holmes v. Aislabie*, 1 Madd. Rep. 551.

In a modern case, where in the condition to a bond, it was recited that the obligor had received divers sums of money on account of the obligee, it was held that he was estopped from saying that he had not received any on his account.

of all, the greater part, or the effect of the thing granted (f).

4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident. 5. It must be of such a thing as he that doth except may have and doth properly belong to him. 6. It must be of a particular thing out of a general, and not of a particular thing out of a particular thing or of a part of a certainty. 7. It must be certainly described and set down. As for examples. ^a If a man grant all his lands in *Essex*, saving, besides, or except his lands in *Dale*, or all his lands in *Dale*, excepting one house, or one acre in certain; or one house, excepting one chamber in certain; these and such like exceptions are good (g). ^b And if one grant a manor, excepting one tenement (parcel of the manor), or excepting the services of *I. S.* (who doth hold of the manor), or excepting one close, or excepting one acre, or excepting the advowson appendant, or excepting the woods, or excepting twenty acres of wood, or excepting all the gross trees; these are good exceptions. ^c And if one grant a messuage and houses thereunto belonging, excepting the barn, or excepting the dove-house; it seems this is a good exception, for they may pass by the grant of a messuage, &c. ^d And if one grant land, excepting the timber trees thereupon, or excepting the trees thereupon; or if a man sell a wood, excepting twenty of the best oaks, and shew which in certain; these are good exceptions. ^e So if one have a manor wherein is a wood called the great wood, and he grant his manor, excepting all the woods and underwoods that grow in the great wood and all the trees that grow elsewhere, this is a good exception. ^f And if one grant a messuage and all the lands and tenements thereunto belonging, excepting one cottage; this is a good exception. ^g And if one grant a reversion, excepting the rent; this is a good exception of the rent, and doth keep it from passing by the grant. So if a man have a rent-charge out of land, and he release his right in the land, except the rent; so if the lord release to his tenant *salvo dominio suo*, &c. these are good exceptions. ^h And if one grant all his horses, except his white horse; this is a good exception of the white horse. ⁱ And if a man be seised of a manor, and lease it by deed indented for life, *exceptis et reservatis quod bene liceat* to the lessor *succidere, dare et vendere omnes grossas arbores in dicto manerio crescentes*, &c. it seems this is a good exception of the trees (k). But if the exception be of another thing than the thing granted; ^l as if one grant a manor or land, excepting 12d. or excepting the tithes, or excepting one acre

Plow. 19. Co. super Lit. 47.

^a Plow. 195. Perk. sect. 641.

^b Dier 103. Plow. 104. 361. 67. Co. 8. 63. 11. 47. 5. 11. Perk. sect. 642. 3H. 6. 35.

^c 14 H. 8. 1.

^d Co. 8. 63. 5. 23.

^e In the case of Haward & Fulcher. Hil. 5 Car. B. R.

^f Co. 11. 64.

^g Perk. sect. 113. 644. Dier 157.

^h Plow. 361. ⁱ 3 H. 6. 45. Perk. sect. 643.

^l Perk. sect. 639. Dier 59.

(f) For if the exception extends to the whole thing granted or demised it is void, *Dorrel v. Collins*, Cro. Eliz. 6. But the exception may be of the greater part of the thing granted, provided there be no repugnancy; as the grant of "all that farm called A. except the close called B." If the farm altogether should only consist of forty acres, and the close excepted should consist of thirty, the exception will be good.

(g) There may be an exception out of an exception, and the thing excepted out of the exception will pass by the deed. *Leigh v. Shaw*, Cro. Eliz. 372.

(h) If a man lets his manor *exceptis omnibus boscis*, the soil of the wood is excepted; but it remains parcel of the reversion of the manor and shall pass by a grant, or lease, of the manor. 3 Co. 11. Cro. Eliz. 521.

Plow. 361. 67. of ground which is no parcel of the manor or of the land before granted; or if one grant the land descended to him of the part of his father, excepting the land descended to him of the part * of his mother; these exceptions are void (i). ¹ Or if the exception be such as it is repugnant to the grant, and doth utterly subvert it, and take away the fruit of it, as if one grant a manor or land to another, excepting the profits thereof; or make a feoffment of a close of meadow or pasture, reserving or excepting the grass of it (k); or grant a manor, excepting the services; these are void exceptions. ² So if one grant his house, chambers, cellars, and shops, excepting his shops; it is said this is no good exception. And by the like reason if one grant his meadow and pasture grounds, except his meadow grounds, this exception is not good, no more than if one grant two manors, or two acres, excepting one of them. And of this opinion was the Chief Justice in *B. R. Hil. 3 Car.* in the case of *Haward v. Fulcher*. ³ And yet if a man make a lease for years of a mill, excepting the profits thereof during the life of the lessor; it is said, this hath been adjudged a good exception. But I doubt of this case, for the exception of the profits of a thing is the exception of the thing itself. And a man cannot grant an estate and reserve a part of the estate (l); as make a feoffment in fee, and reserve a lease for life; or grant an advowson, and reserve the presentation for his life. ⁴ Or if the exception be of an inseparable incident and a thing that cannot be granted by itself and from another, as if a manor be granted, excepting the Court Baron, or land be granted, excepting the common appendant thereunto belonging; these exceptions are void. But exceptions of severable incidents are good. ⁵ Or if the exception be of such a thing as the grantor cannot have nor doth belong to him by law; as if a lessee for years assign over all his term in the land, excepting the timber trees, earth, or clay; this exception is not good (m). But if lessee for life make a lease for years, or lessee for twenty-one years make a lease for twenty years; or tenant by the curtesy, or in dower, grant over their estate, excepting the timber trees; these are good exceptions. And if a lessee for life or years open a coal mine, and then assign over his estate, excepting the mines or the profits thereof; these are void exceptions. ⁶ Or if the exception be of a particular thing out of a particular thing, as if one grant white acre and black acre, excepting white acre, or grant

* P. 79.

This difference
hath been
agreed.

¹ Co. super
Lit. 47. Plow.
53.

(i) Here the things excepted are not comprised in the things granted, and therefore would not have passed by the deed had they not been excepted. With respect to tithes, where they belong to the owner of the lands out of which they issue, it is by some ignorantly supposed that the right to the tithes is merged or extinguished in the ownership of the lands, or that they so far constitute a part of the lands as to pass by a grant of the land, or under the general words as an appurtenant to them. The tithes, however, although in the hands of or belonging to the owner of the lands out of which they issue are still a distinct inheritance, and therefore wherever it is intended to convey the tithes as well as the lands out of which they issue, the tithes must be expressly named.

(k) Query of this, as it has been determined that a right to the soil and to the herbage may subsist in different persons, see Mr. Thomas's valuable edition of *Co. Lit.* vol. i. page 230, note 8.

(l) It would appear from the case of *Jermyn v. Orchard*, (*Show. Cas. in Parl.* 199.) that an assignment of a term of years to commence at a future day or on a future event, is not good. But see *Plowd. Com.* 524, which seems to countenance a contrary opinion.

(m) These things not being in his power, for they do not belong to him by law, 5 Co. 12 b;

twenty

twenty acres of land by particular names, excepting one acre of them; these exceptions are void. Or if the exception be set down uncertainly, as if one grant a house, excepting one chamber; or grant a manor, excepting one acre; but doth not set forth which chamber, or which acre it shall be; these exceptions are void (a).

Perk. sect.
643. 641.

8. *Tenendum*.
Quid.

A *tenendum* is a clause of the deed whereby the tenure was heretofore created. And this doth most commonly and properly succeed the *habendum*, and was made by this word *tenendum per servitium*, &c. But since the statute of *Quia emptores terrarum* * when the fee simple doth pass, the tenure is always of the chief lord, and is thus set forth, *tenendum de capitalibus dominis*, &c. And this clause at this day is for the most part omitted altogether (o).

Co. super Lit.
6. & Co. 9. 130.

* P. 80.

9. Reservation
or *Reddendum*.
Quid.

A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c. doth reserve some new thing to himself out of that which he granted before. And this doth, most commonly, and properly, succeed the *tenendum*, and is made by one or more of these words, *reddend'*, *reservand'*, *solvend'*, *faciend'*, *inveniend'*, or such like. This doth differ from an exception, which is ever of part of the thing granted, and of a thing in *esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before; so that this doth always reserve that which was not before, or abridge the tenure of that which was before.

Co. 10. 107.
Plow. 132.
Co. super Lit.
47. Perk. sect.
625.

10. What shall
be said a good
reservation;
and what not.

In every good reservation these things must always concur. 1st. * It must be by apt words. 2d. It must be of some other thing issuing, or coming out of the thing granted, and not a part of the thing itself, nor of some thing issuing out of another thing. 3d. It must be of such a thing whereunto the grantor may have resort to distrain. 4th. It must be made to one of the grantors, and not to a stranger to the deed. As for examples: ^b If a man grant land, yielding and paying money or some such like thing yearly; this is a good reservation. But if the grantee covenant to pay such a sum of money, or to do such a thing yearly; this is no good reservation, but a covenant to pay a sum of money in gross, and not as a rent (p). * If a lease be made for years, rendering a rent to the lessor or his heirs, in the disjunctive; or rendering a rent to the lessor, without saying [and his heirs, &c.]; or rendering a rent during the said term, and doth not say to whom (q); or rendering £10 to the lessor, and £5 to his

* Plow. 13.
Perk. sect.
626. Co. 8. 78.

^b Plow. 132.

Covenant.

* Co. 5. 111. 8.
71. super Lit.
214. 213. 99.

(a) See further by what words an exception may be made, the effect of it, and when it shall be void; in Com. Dig. Falt (E. 5). In conveyances and leases of lands, after the description of the parish, and after the exceptions, if there be any, there are usual added what are called *the general words*: as all out-houses, buildings, lands, meadows, closes, pastures, woods, &c. to the said manor, messuages or tenements, lands and hereditaments belonging, or in any wise appertaining, or accepted, reputed, taken, or known as part, parcel, or number thereof, or of any part thereof, or used, occupied, or enjoyed therewith, or with any part thereof. These general words are sometimes of considerable utility, and may carry what would not have passed by the deed without them. They are not, however, allowed to extend further than was clearly intended by the parties, *Moore v. Magrath*, Cowp. 9.

(o) See ante, page 52, note (e).

(p) See accordingly *Athowe v. Heming*, 1 Roll. Rep. 80. 2 Bulst. 281. S. C.

(q) Except in the case of leases under acts of parliament (as the act of 32 Hen. 8. c. 28.) this is considered the most advisable mode of reserving rent, for then it will belong to the reversion, and whoever is entitled to the reversion will be entitled to the rent.

heirs;

heirs; all these reservations are good. But if a lease be made, rendering rent to the heirs of the lessor; this reservation is void because the rent is not reserved to himself first. ^d If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing; this is a good reservation: but if the reservation be of the grass, or of the vesture of the land, or of a common, or other profit to be taken out of the land; these reservations are void.

* Co. super
Lit. 142.

* Co. super
Lit. 47.
Co. 5. 3. Perk.
sect. 626.

* If one grant a manor, messuage, land, meadow, or pasture, or the vesture or herbage of land, meadow, or pasture, rendering a rent; this is a good reservation. But if one grant tithes, rents, commons, advowsons, offices, a corody, mulcture of a mill, a fair, market, privilege, or liberty, reserving a rent; this reservation is void. And yet such a reservation in case of the King is good. And in case of a subject also, if a lease be made by deed in writing of any such thing for a term of years, reserving a rent; this may be good by way of contract to *produce

Prerogative.

* P. 81.
Deed.

an action of debt, though not as a rent to be distrained for. And thus by apt words, an apt rent out of manors, and such like memorable things, or divers rents, may be reserved upon one grant. As if one grant the manors of *A. B.* and *C.* rendering for *A.* 20s. for *B.* 20s. and for *C.* 20s. these are good rents, and several. So if one grant the manors of *A. B.* and *C.* rendering £3. viz. for *A.* 20s. for *B.* 20s. and for *C.* 20s. this is a good reservation; but in this case the rent is entire (*r*). Also one may reserve one rent one year, and another rent another year; as 10s. one year, and 20s. another year: or one may reserve a rent to be paid every second, or third year, and no rent the other years; or one may reserve one kind of rent one year, and another kind of rent another year; and these reservations are good. And these reservations may be by fine, as well as by deed; or it may be in case where the lessor hath a reversion of the land, or upon a partition to make an equality, without any deed at all. But if it be upon an exchange to make an equality, it is not good except it be by deed. ^f If two joint-tenants join in the grant of their land by deed indented, and the rent is reserved to one of them; this is a good reservation, and shall go to him alone. But if it be by word (*s*), or by deed poll, that the lease is made, the rent shall go to them both. ^g And if a man possessed of a term, join his wife with him, and they both assign over this term by indenture, rendering a rent to them two, and the survivor of them, and she doth not seal the deed; in this case the reservation as to the wife is void. And if the reservation be of the rent to a stranger that is no party to the deed, and to him only, this reservation is void. And therefore if the father and his son and heir apparent, by indenture, lease his land for

Co. 355. Dier
308. Co. super
Lit. 47. 164.
213.

Co. super Lit.
225. 8 H. 7. 9.
Bro. Fine, 36.
Reservation, 4.

* Co. super Lit.
214. 143. 47.
Dier 222.

* Adjudged
Mich. 8 Car. in
Bland's case.

Hobart's Rep.
374. Oates &
Fith. Co. 3.

(*r*) And if *A.* makes a lease of three manors, rendering £10 rent, (viz.) £5 out of one, and £5 out of another; this will be a good lease and reservation, and the third manor shall be discharged. Moor, 880.

(*s*) Since the statute of Frauds (29 Car. 2. c. 3.) a lease by parol for more than three years is not good.

years,

years, to begin after the father's death, rendering rent to the son, it is void.

10. Condition,
Quid.

A condition is a clause of restraint in a deed, or a bridle annexed and joined to an estate, staying and suspending the same, and making it uncertain whether it shall take effect or no.

11. Warranty,
Quid.

A warranty is a clause or covenant made in a deed by the one party unto the other, whereby the feoffor, donor, or lessor, doth, for him and his heirs, grant to warrant and secure land granted to the feoffee, donee, or lessee, and his heirs during the estate.

12. Covenant,
Quid.

A covenant is a clause of agreement contained in a deed, whereby either party is bound to do, perform, or give something to the other. And of all these see at large afterwards.

13. How and
to what pur-
pose a deed of
grant in gross
shall enure and
be construed
and taken.

* P. 82.

In the construction of deeds it must be considered,
1st. How a deed in the gross shall be taken and enure.
2d. How it shall be taken and expounded in the several parts and pieces of it. And for the first, these rules are to be known; 1st. If divers join in a deed, and some are able to make such a deed, and some are not, this shall be said to be his deed alone that is able; as if divers join in the grant of a thing by deed, and one alone hath all the estate, and the rest have nothing in the thing granted; it shall be said to be his grant alone that hath the estate. And so *de converso*. If a deed be made to one that is incapable, and to others that are capable, in this case it shall enure only to him that is capable. 2d. A deed that is intended and made to one purpose, may enure to another; for if it will not take effect that way it is intended, it may take effect another way. And therefore a deed made and intended for a release, may amount to a grant of a reversion, an attornment, or a surrender, or *de converso*. And if a man have two ways to pass lands by the common law, and he intendeth to pass them one way, and they will not pass that way; in this case *ut res valeat* it may pass the other way. As if a man be seised of two acres of land in fee, and letteth one of them for years, and after intending to pass them both by feoffment, maketh a charter of feoffment, and maketh livery of the acre in possession in the name of both the acres; in this case the acre in possession only doth pass: but if the lessee of the other acre attorn, then the reversion of that acre will pass also (f). But where a man may pass lands by the common law, or by raising of a use, and settling it by the statute, there in many cases it is otherwise. As if the father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made; in this case no use shall arise to the son (u). So if a man, in consideration of marriage, make a feoffment with a letter of attorney to give livery, and no livery is made; in this case no use will arise. And so it was held by Chief Justice Popham, B. R. for the intention of the parties doth work much, in the

Co. super Lit.
302. Perk.
sect. 66.

Dier 251. Co.
3. 35. & super
Lit. 49.

(f) Attornment being now unnecessary (see act of the 4 Ann. c. 16, sect. 9.) the reversion of the other acre would pass without attornment.

(u) See *Habergham v. Vincent*, 2 Ves. jun. 226, *contra*.

- Dier 96. raising and direction of uses. And therefore it is said, that when a man doth intend to pass land one way, it shall never pass another way, contrary to his intent; as if one covenant for good considerations to levy a fine of land to the use of *J. S.* and his heirs, if no fine be levied, no use shall arise upon the covenant. If one by the words, bargain and sell, give and grant, make a feoffment of his house for money, and intending to pass it by way of bargain and sale and inrolment, the deed being made, there being a Master of the Chancery in the house whereof the feoffment is made, he doth acknowledge and deliver the deed before him; in this case if the deed be not inrolled, the conveyance is void, and that delivery shall not amount to a livery of seisin (*w*). And yet when the intent is apparent to pass it one way, or another, there it may be good either way; as where one doth make a feoffment in fee, with a letter of attorney to make livery; and in the same deed doth covenant, in case livery of seisin be not had to perfect the deed, to stand seised to the uses of the feoffment; in this case, albeit no livery of seisin be made, or attornment had, to perfect the feoffment or grant, yet if it be in such a case where there is a consideration sufficient to raise the uses by the covenant, the uses will arise by the covenant (*x*). 3d. When a deed may enure to divers purposes, he to whom the deed is made, shall have election which way to take it, and he may take it that way as shall be most for his advantage. As if a deed of grant be made by the words *dedi et concessi*; this in law may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender; and it is in the choice of the grantee to plead or use it the one way or the other. So if a lease for years be made to me of land for money, by the words "demise, grant, bargain, and sell:" I may take and use this by way of bargain and sale, or by way of demise, at my pleasure (*y*). So if one have a rent out of land whereof I and my wife are jointly seised, and he doth by his deed release, give and grant this rent to me; in this case, I may use this as a release to extinguish the rent, or as a grant of the rent, as it may make most for my advantage. *Et sic de similibus*. But where any inconvenience may grow by such an election, there the grantee shall not have an election, but it shall enure as it may; as, where a man may pass land by the common law, or by raising of an use and settling it by the statute, there sometimes it is so. And therefore if in the same case before, a father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made; hereby no use will arise to the son, as it will in case of a covenant (*z*). And if a lease
- 19 Eliz. Tho-
roid & Gor-
den's case.
- Experientia.
- Co. super Lit.
301. Dier 251.
- Co. 2. 36.
Dyer 30. 302.
- Dier 109. 319.
- Co. 2. 35. 36.

* P. 83.

(w) The great and primary intention being to pass the land if the deed will effect that intention in any way, the land, it is conceived, will pass, although the deed cannot operate in the very way in which the parties appear to have intended it should operate, see *Roe v. Tranmer*, 2 Wils. Rep. 75.

(x) See accordingly Bac. Use of the Law, 151. Gilb. Law of Uses, 81. post, 165; and fully in the chapter of Uses, *infra*.

(y) By the words "bargain, sell, and alien," a remainder or reversion will pass although the deed is not enrolled, as it will operate as a grant of such remainder or reversion. *Adams v. Steere*, Cro. Jac. 210.

(z) See *contra*, *Hubergham v. Vincent*, 2 Ves. jun. 226.

for years be made of a manor, by the words "bargain, sell, demise, and grant," and this is to begin at a day to come; in this case it must pass entirely as a demise at the common law, or entirely as a bargain and sale, and the lessee hath not election to take or use it otherwise, or to use it for part one way, and for part another way. 4th. It shall enure as much as may be according to the apparent intent of the parties. And therefore it is, that if a feoffment be made of a manor with an advowson appendant; or a bargain and sale of land in possession, and land in reversion together, be made; and the feoffment is not well executed for want of livery of seisin or attornment, or the deed of bargain and sale is not inrolled; in these cases, albeit the advowson may pass without livery or attornment, and the reversion without inrolment, yet because the intent doth appear to be that all shall pass together, therefore neither the advowson, nor the reversion, will pass by this deed (a). 5th. When a deed is made, it shall enure as it may, and so as it may have and take the most and best effect that may be according to reason; as if tenant for life, or years, and he in remainder or reversion in fee, join in a feoffment by deed; this shall enure in the first case as the lease of the tenant for life, and the confirmation of him in the remainder or reversion, and in the last case as the feoffment of him in the reversion, &c. and the surrender of the lessee for years to the feoffee; and no forfeiture of the estate in the lessee for life. But if in this case the feoffment be by word (b), it seems it shall enure first as a surrender of the estate of the tenant for life, and then the feoffment of him in reversion, *ut res valeat*. And if A. be tenant for life, the remainder to B. for life, the remainder to D. in tail, the remainder to the right heirs of B. and A. and B. join in a feoffment by deed, in this case, this is the feoffment of A. and confirmation of B. but a forfeiture of both their estates whereof the tenant in tail may take present advantage. If tenant for life grant a rent charge to him in reversion in fee, and he by his deed doth grant this rent over to another and his heirs; this is a good grant and confirmation also, to make the rent pass to the second grantee in fee simple. So if a disseisor make a lease for life, the remainder to the disseisee, and the disseisee doth grant the remainder over; this is a good grant and confirmation also. If A. do bargain and sell his land to B. by indenture, and before inrolment they do both grant a rent-charge to C. by deed, and after the indenture is inrolled; in this case, after the inrolment this shall be said to be the grant of B. and the confirmation of A. and if the deed be not inrolled, it shall be said to be the grant of A. and confirmation of B. If one makes a charter of

Finch's law,
58.

Plow. 140. 59.
Co. super Lit.
302.

* P. 64.

Forfeiture.

Co. 5. 15.

Co. super Lit.
147.

(a) As a more liberal construction prevails at the present day, the probability is, that the deed would be held to operate as far as it could. The case indeed seems to fall within the maxim "*cum quod non valet ut ago, valet quantum valere potest*." See too 3 Lev 9. 213. 371. But where a deed cannot operate at all at law, yet if it is entered into for a valuable consideration a court of equity would compel the grantor to execute a new deed.

(b) Since the statute of Frauds (29 Car. 2. c. 3.) a feoffment cannot be made without a writing.

feoffment

Co. super Lit.
21.

feoffment of one acre of land to A. and his heirs, and another deed of the same acre to A. and the heirs of his body, and deliver seisin according to the form and effect of both deeds; it seems this shall enure by moieties, viz. he shall have an estate tail in the one moiety with the fee simple expectant, and a fee simple in the other moiety. If two

Co. super Lit.
45.

several tenants of several lands join in a lease for years by deed indented; these be several leases, and several confirmations from each of them from whom no interest passeth, and doth not work by way of estoppel. If B. tenant for life of C. and he in remainder, or reversion in fee of the same land, join in a lease for life, or years, by deed indented; this shall enure during the life of C. as the lease of B. and the confirmation of him in reversion, or remainder, and after the death of C. as the lease of him in reversion, or remainder, and the confirmation of B. without any estoppel. If tenant in tail, and he in reversion, grant a rent-charge in fee, it shall be taken to be the grant of the tenant in tail, and the confirmation of him in reversion; but when the tenant in tail dieth without issue, it shall be taken to be the sole grant of him in reversion.

Estoppel.

Perk. sect. 80.

If two joint-tenants be in fee of an acre of land, and they lease it to a stranger for life, and the lessee grant his estate to one of the lessors; in this case it seems it shall enure for a moiety by way of grant, and for the other moiety by way of surrender.

Perk. sect. 81.
Dier 140.

If there be lord and tenant, and the lord grant his seigniority to his tenant, and to a stranger; this shall enure for a moiety to the tenant by way of extinguishment, * and

* P. 85.

Perk. sect. 82.
83.

for the other moiety to the stranger by way of grant. If tenant for life of the grant of a woman sole, grant his estate to the husband of the wife, this shall enure for the whole by way of grant.

If a lease be made for life, the remainder for life to a stranger, and the lessee grant his estate to his lessor, this shall enure by way of grant. If there be lord and two joint-tenants in fee, and the lord grant his seigniority to one of his tenants in fee; it seems this shall take effect for the whole by way of extinguishment. If there be lessee for life, and the reversion descend to two coparceners, and one of them take a husband, and the lessee grant his estate to the husband and wife; this shall enure by way of grant for the whole. If the disseisee, and the heir of the disseisor (being in by descent,) make a feoffment by one deed, and livery of seisin thereupon; this is the feoffment of the heir only and the confirmation of the disseisee (c). 6. If one have divers estates in land, and he make any charge or grant upon or out of it; this shall issue out of all his estates. And if one have a possession and an ancient right, and grant a rent-charge out of the land, or make a lease of the land; this shall issue out of both the estates, and it shall enure from him having several estates, as it shall enure from several persons having the same estates. *Quando duo jura concurrant*

Co. super Lit.
372. Co. 7. 14.
1. 147. 148.
5 E. 4. 2.

Perk. sect.
89.

(c) See supra, pages 14 and 15, notes (t) and (v), on the subject of disseisin.

in una persona, æquum est ac si essent in diversis. 7. If one that hath a rent-charge out of a manor, by grant reciting his grant, grant the same rent to a lessee for life of the manor out of which the rent doth issue, to have and perceive to him and his heirs, and surrender to him the deed: this shall not enure to extinguish the rent, but by way of grant, of which the heir of the lessee for life may take advantage, if he do not by granting away the rent, purchasing the reversion of the manor, or making a feoffment of the manor, and thereby committing a forfeiture, or by some such like means prejudice himself; for by these means the rent will be extinct and determined. If a disseisor grant a rent to the disseisee, and he by his deed doth grant it over to another; or the disseisor make a lease for life, or gift in tail, the remainder to the disseisee, and the disseisee doth grant over this remainder, and the tenant attorn; these grants of the disseisee shall be taken for a grant and a confirmation also, *ne res pereat*. If there be lord and tenant of white acre and two other acres, and the lord grant by deed to his tenant that he will not distrain his tenant in white acre for his service; this grant shall not enure to determine the seignior in any part, but as a covenant, so that if he do distrain in white acre, the tenant may have an action of covenant. If a man have a wood of 200 acres, and he grant it to another for life or years, and that he shall cut therein four or five acres every year: in this case, albeit the wood be granted and the grant shall enure to pass it, yet the grantee can *cut no more but four or five acres by the year; and yet the grantor, as this case is, cannot himself cut any of the wood during the time; as in case where a man doth grant to another, that he shall cut every year four or five acres in such a wood: for in this case the grantor may notwithstanding cut as much as he will. And here note, that in all the cases before, according to the construction that the law makes of the deed, so must the party, that is to use it, set it forth and plead it; as when it shall enure as a lease, then it must be pleaded as a lease, &c. See more in *Release, numb. 9. Surrender, numb. 7. Confirmation, numb. 7.*

Co. super Lit.
302.

Perk. sect. 69.

Mich. 37 & 38
Elin. B. R. Ca-
ria.

* P. 86.

14. How a deed of grant shall be construed and taken in all the parts and branches thereof.
General rules.

In the construction of deeds it must be observed, that there are some general rules that are applicable to all the parts of all kinds of deeds, and some that are applicable only to some kind of deeds, and to some part of the deed only. In the construction therefore of all parts of all kinds of deeds, these rules are universally observed:

1. That the construction be favourable, and as near to the minds and apparent intents of the parties, as possible it may be, and law will permit: for *benigne sunt faciende interpretationes chartarum propter simplicitatem laicorum. Et verba intentioni non è contra debent inservire* (d). As, if there

Co. super Lit.
313. Lit. sect
563. Plow.
160. 154.

(d) And where words are not properly arranged they will be marshalled and transposed so as to them if possible give effect to the intention of the parties. 1 Inst. 217. note (b). So words in a deed which are evidently repugnant to the general intention of the parties will be rejected, for words of the deed are not the principal thing to be attended to, but the design and intention of parties. *Smith v. Parkhurst*, 5 Atk. 135. But where the words of the deed are so uncertain that

there be lord and tenant, and the tenant grant the tene-
ments to one man for term of his life, the remainder to

intention of the parties cannot be discovered the deed will be void; as in the case of a gift to one of the four children of A. B. without naming it, here the gift will be void for uncertainty.

Evident omissions in deeds will be supplied: as where the name of the grantor was omitted in the operative part it was supplied by construction. *Lloyd v. Lord Say and Sele*, 1 Salk. 341, and 10 Mod. 40. In order to effect the evident intention the word "and" has frequently, both in deeds and wills, received a disjunctive construction, and the word "or" a conjunctive one: In a deed declaring the use of a recovery, it was declared it should enure to the use of J. S. his heirs and assigns, and to such uses as he should appoint by will: The evident intention being, that the recovery should enure to J. S. his heirs and assigns, or to such uses as he should appoint, the word "and" was construed disjunctively in order to satisfy the intention. In various other cases the word "and" has received a disjunctive, and the word "or" a conjunctive construction in order to effectuate the intention. See *Framingham v. Brand*, 3 Atk. 390. *Brownson v. Edwards*, 2 Ves. 243. *Doe v. Jessop*, 12 East. T. R. 288. *Fairfield v. Morgan*, cited 9 East. T. R. 373. *Wright v. Kemp*, 2 Durnf. & East. T. R. 470. *Welsh v. Patterson*, 3 Atk. 193. *Dobbins v. Bowman*, ib. 408. *Right v. Day*, 16 East. T. R. 67. To give effect to the evident intention of the parties, entire sentences or clauses of a deed will be transposed. Thus in the case of *Uvedale v. Halfpenny*, (2 P. W. 151.) the limitation to trustees to preserve contingent remainders, was placed after the limitations to the first and other sons in tail, and the Court transposed the limitations. So in a marriage settlement, where a term of years for raising younger children's portions was inserted after the limitations to the first and other sons in tail, the Court ordered it to be inserted before such limitation, such being the evident intention of the parties. See *Green v. Hayman*, 2 Cas. in Cha. 10. On the subject of altering or reforming settlements and rendering them agreeable to the intention, see *Treatise on Settlements*, page 152; and see also 108. On the subject under consideration (the construction of deeds), it may be proper to observe, that with a view to give effect to the intention of the parties, deeds, which cannot operate according to their exact nature and import, may nevertheless operate in some other way. As where a conveyance was void, as a lease or release, by reason of the releasor only having a term of years in the lands; yet it was held that it should operate as a grant and assignment. *Marshall v. Franks*, Gilb. Eq. R. 143. So in order to effectuate the intention of the parties, a release will be construed to operate as a grant of a reversion, in case there is an antecedent term of years or life estate. *Goodtitle v. Bailey*, Cowp. 597. So a feoffment, by deed, to a person related to the feoffor may operate as a covenant to stand seised where there has been no livery of seisin. *Habergham v. Vincent*, 2 Ves. jun. 226.

In all modern deeds the granting part contains a great number of the most operative technical words. Thus, in a release, the words "grant, bargain, sale, alien, release, and confirm," are generally used; because if the conveyance should not happen to be good as a release, it may notwithstanding operate either as a grant of the reversion expectant upon a term of years or life estate; or as a bargain and sale if inrolled; or as a confirmation, &c.: And in all other deeds it is proper to insert a number of technical operative words, in order that if the deed cannot operate in the way intended, it may, if possible, operate in some other.

Where a deed may operate in different ways, the person to whom it is made shall have his election which way to take it. As if a deed of grant be made by the words "*dedi et concessi*;" this in law may amount to a grant, feoffment, gift, lease, release, confirmation, or surrender; and it is in the choice of the grantee to plead or use it one way or the other. See *Heyward's case*, 9 Rep. 35a.

It may be proper to advert to the point whether deeds to uses should be construed with the same latitude of construction as wills; that is, according to the intention of the parties, though not expressed in the proper legal and technical words. Though there are authorities which favor this latitude of construction, yet as conveyances to uses are made with the same care and deliberation that common law conveyances are made, there appears to be no reason why they should not be governed by the same rules of construction; and the more modern authorities countenance the opinion that they are to be construed in the same way with conveyances at common law. See *Tapner v. Marlott*, Willes Rep. 180. and see also 2 Bro. Rep. 233. and 3 T. Rep. 765.

With respect to articles or agreements, the construction of them is different from the construction of final complete conveyances; for articles are only considered by courts of equity as heads or memoranda of something to be afterwards completed; and therefore the court of chancery will so construe them as to effect what appears to have been the manifest intent and design of the parties, not paying any attention to the technical sense or operation of the words which may be made use of in framing the articles.

As to the construction of marriage articles, and conveyances in pursuance of them, see *Treatise on Settlements*, page 92, *et infra*; and on the construction of wills directing settlements, see *Treatise on Settlements*, page 462.

In construing deeds or agreements where there is a patent ambiguity, that is, an ambiguity which appears upon the face of the instrument, no averment or parol evidence is allowed. But in the case of a latent ambiguity an averment, supported by parol evidence, is admissible. Thus, if a feoffment be made of the manor of S. and the feoffor has a manor called North S. and another called South S. parol evidence will be admitted to shew which manor was meant. But for further information on this subject, see Mr. *Sydenhams* valuable *Treatise on Vend. & Purch.* page 134 and 133.

another in fee, and the lord grant the services to the tenant for life in fee; in this case, howbeit a grant may enure by way of release, and a release to the tenant for life shall enure to him in remainder, and is an extinguishment, yet, because this is contrary to the intent, it shall be taken for a suspension only of the services during the life of the tenant for life, and the services shall go afterwards to his heir. But if the intent of the parties be apparently against law, then the construction shall not apply the deed to their intent: as if one give land to another and his heirs for twenty years; in this case the executor, and not the heir, shall have this land after the death of him to whom it is given. So if one by deed intending to give land to another and his heirs, give the land to him, to have and to hold to him, or to him and his assigns, for ever, without these words [and his heirs] this is but an estate for life at the most.

Doct. & Stud.
39. Lit. cap. 1.

2. That the construction be reasonable and according to an indifferent and equal understanding: and therefore if I grant to another, common in all my manor, this shall be expounded to extend to commonable places only, and not in my gardens, orchards, &c. And if I grant to one estovers out of my manor, he may not by this cut down my fruit trees. And if one grant me (a Barrister) a fee *pro consilio*; this shall be taken for counsel in law only. And so in case of a physician. And if one grant to me to dig in all his *lands for tin; I may not by this grant dig under his house. And if one grant me common for all my beasts; this shall be taken for all my commonable beasts, and not for goats, and the like. And if one grant me all his trees in his manor; by this I shall not have his apple trees (e). And if one lease to me his house and land, to the end that I may make profit thereof in the best manner; by this grant I may not prostrate the house or make waste.

Plow. 161.
16 H. 8. 10.
Dier 15. Fitz.
Barre, 237.
Bro. Dom. 14.
17 E. 3. 7.
46 E. 3. 17.

* P. 87.

3. That too much regard be not had to the native and proper definition, significations, and acceptance of words, and sentences, to pervert the simple intentions of the parties; for a manor may pass by the name of a messuage, or a knight's fee, if it be used so to be called: & *sic à converso*, a messuage by the name of a manor: a remainder may be granted by the name of a reverter; a reversion by the name of a remainder: for the law is not nice in grants, and therefore it doth oftentimes transpose words contrary to their order, to bring them to the intention of the parties (f): and it is a rule of law, *Mala grammatica non vitiant chartam*, neither false Latin, nor false English, will make a deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives do not make an affirmative, when the apparent intent is

Plow. 154. 170.
134. Dier 46.
Co. super Lit.
223. 146. 217.
Co. 9. 48. 10.
1. 3.

(e) See accordingly, Hob. 304.

(f) "For the words are not the principal things in a deed, but the intent and design of the grantor. And the words are to be construed in a manner most agreeable to the meaning of the grantor; words which are merely insensible are to be rejected. 3 Atk. 136. per *Ld. Ch. J. Willes*, who lays down some general rules for the construction of deeds.

contrary. And it is another rule of law, *falsa orthographia non vitiat concessionem*.

Plow. 160. 161.

4. That the construction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts do agree together and there be no discordance therein. *Ex antecedentibus & consequentibus est optima interpretatio: for Turpis est pars quæ cum suo toto non convenit. Maledicta expositio quæ corrumpit textum.* If a man make a feoffment of all his land in *D.* with common in *omnia* *terris suis*: this common shall be intended in the lands granted in *D.* only, and not elsewhere; for it must be understood *secundum subjectam materiam*.

Lit. sect. 283.
Finch's Ley
60. Plow. 160.
154.

5. That the construction be such as the whole deed and every part of it may take effect, and as much effect as may be to that purpose for which it is made (*g*); so as when the deed cannot take effect according to the letter, it be construed so as it may take some effect or other: *Verba debent intelligi cum effectu. Et benigne faciendæ sunt interpretationes, ut res magis valeat quam pereat.* And therefore if an annuity be granted *pro consilio impendendo*, or a feoffment made *ad erudiendum filium*, or *ad solvendum* 10s. these shall be construed conditional grants without any words of condition; for otherwise the party will be without remedy.

Ca. super Lit.
183. Finch of
the Law, 6.

6. That all the words of the deed in construction be taken most strongly against him that doth speak them, and most in advantage of the other party; *Verba Chartarum fortius accipiuntur contra proferentem: & qualibet concessio fortissime contra donatorem interpretanda est (h).* * And therefore if one seised of land in fee grant it to another, and say not for what time, this shall be taken an estate for life. But this is to be understood with this limitation, that no wrong be thereby done, for it is a maxim in law, *quod legis constructio, non facit injuriam.* And therefore if tenant for life grant the land he doth hold for life, to another, and doth not say for what time; this shall be taken an estate for his own life, and not the life of the grantee, for then it would be a forfeiture. So if one be seised of some lands in fee, and possessed of other lands for years, all in one parish, and he grant all his lands in that parish (without naming them) in fee simple, or for life; by this grant shall pass no more but the lands he hath in fee simple (*i*). So if a man have a house, wherewith

* P. 88.

Forfeiture.

(g) This is a rule both in law and equity, per Lord Chancellor Parker, 1 P. W. 457.

(h) This rule, from its strictness and rigour, is the last to be resorted to, and is never to be relied upon but where all other rules of construction fail. Bac. Elem. Reg. 3. It must be understood with the restriction too in the case of an indenture which is executed by the grantee as well as the grantor, where the words are to be considered as the words of both. Plowd. 134. But in the case of a deed poll, being executed by the grantor alone, the words are his only and shall therefore be taken most strongly against him. See supra, page 53, note (i), on the construction of a deed poll.

(i) But wherever no forfeiture would be occasioned, leasehold lands held with and reputed part of a freehold estate would pass by the conveyance of the freehold by force of the general words "all lands, lands, &c. to the said freehold estate belonging or appertaining." See *Doe v. Williams*, 11 Blackst. Rep. 25, and see infra, page 92, note (e).

there hath been copyhold land, and other land, usually occupied; and he let this house and all his land thereunto belonging; in this case, and by this demise, the copyhold land doth not pass; for in both these cases then there would be a forfeiture. But otherwise by these words all the land in both cases would pass.

Co. super Lit.
112.

7. That if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received, and the latter rejected, except there be some special reason to the contrary; and therefore herein a deed doth differ from a will, for if there be two repugnant clauses in a will, the first shall be rejected, and the latter received (k).

4 El. the Bishop of Ely's case.

8. That that which is generally spoken, be generally understood; unless it be qualified by some special subsequent words, as it may be: for if one be seised of a manor wherein there is a park, and he grant the manor with the custody of the park; by this the park will not pass.

Co. super Lit.
42.

9. That if the words may have a double intendment, and the one standeth with law, and the other is against law, that it be taken in that sense which is agreeable to law: and therefore if tenant in tail make a lease of land to B. for term of life, and do not mention for whose life it shall be; this shall be taken for the life of the lessor, and not for the life of the lessee, as it shall be if such a lease be made by tenant in fee simple.

9 Ed. 4. 4.

10. That things doubtfully set down, be applied to him to whom they do properly belong: as if I. S. make a feoffment to one of his own name, and there is a covenant in the deed that I. S. shall deliver the deeds, this shall be taken of I. S. the feoffor, and not I. S. the feoffee.

Co. 9. 48. 10.
143.

11. That such a construction be made of abbreviations, as the deed may not lose its force: as if one grant *tot' ill' Maner' de D. & C.* if it be but one manor, the words shall be taken for *totum illud manerium*; if two manors, then it shall be taken for *tota illa maneria*. And here note that most of all these rules run through all the cases of exposition hereafter following (l).

Fit. Grant.
41. Pl. 317.
Co. 5. 12.
22 Ass. pl. 61.
Perk. sect.
110.

(k) After a good deal of conflicting authority on the subject (See Co. Lit. 112, note (b). Owen, 84 Plowd. 541.) it seems now to be understood, that if a thing be given by one part of the will to one person and by another part to another, that the devisees shall take as joint tenants or tenants in common according as the language of the will may import one or the other. See 3 Atk. 493, *an Edwards v. Symons*, 6 Taunt. 218. But in the case of inconsistent devises of the same thing to the same person, (as first a limitation in fee simple, and afterwards for life or in tail) the latter will prevail. See *Wyckham v. Wyckham*, 18 Ves. 421.

(l) As to rules for the construction of deeds and wills, see Plow. 160. Lilly's Prac. Com. 152. Finch's Law, 58. and 3 Atk. 136. "The rules of property, rules of evidence, and rules of interpretation, are, or ought to be, in courts of law and equity, exactly the same; both ought to adopt the best, or must cease to be courts of justice." 3 Bla. Com. 454.—A court of equity is as much bound by positive rules and general maxims concerning property, as a court of law is, per Lord Mansfield, in 2 Burr. 1108; where the rules of construction are fully discussed.—The construction does not vary with the Court: it is the different subject-matter of the limitation which occasions the difference in the construction of it, and will occasion the same difference of construction even in the same court. See Fearn on Cont. Remainders, 3d edit. 93. In the construction of ancient grants and deeds, there is no better way of construing them than by usage, and contemporaneous exposition is the best way to go by, per Lord Hardwicke, 3 Atk. 577.

Touch

‡ Touching things granted, these rules are first to be known.

1. When any thing is granted, all the means to attain it, and all the fruits and effects of it, are granted also, and shall pass *inclusive*, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words. *Cuicunque aliquid conceditur, conceditur etiam & id sine quo res ipsa non esse potuit*. As by the grant of consuance of pleas, is granted the ordinary process to bring causes to judgment. By the grant of a ground, is granted a way to it (m). By the grant of trees is granted with all power to cut them down and take them away (n). By the grant of mines, is granted power to dig them: and by the grant of fish in a man's pond, is granted power to come upon the banks and fish for them (o).

2. The incident, accessory, appendant, and regardant, shall in most cases pass by the grant of the principal, without the words *cum pertinentiis*, but not *à converso*; for the principal doth not pass by the grant of the incident, &c. *Accessorium not ducit, sed sequitur, suum principale*. And therefore by the grant of a reversion without naming the rent, a reversion after an estate tail, for life, or years, and the rent reserved upon the estate, will pass, so as the tenant attorn to the grant (p): but by the grant of the rent the reversion will not pass. So by the grant of a manor, the Court Baron thereunto belonging will pass; by the grant of a house, or ground, the ways thereunto belonging do pass; by the grant of arable land, the common appendant thereunto will pass; by the grant of mills, the waters, flood gates, and the like that are of necessary use to the mills do pass; by the grant of a house, the estovers appendant thereunto will pass; by the grant of a manor, the advowsons appendant, and villains regardant thereunto, pass (q); by the grant of a fair, the Court of Piepowders will pass; by the grant of homage, or rent, the fealty will pass; and by the grant of escuage, homage, and fealty will pass. But divers things that by continual enjoyment with other things are only appendant to others, as warrens, leets, waifs, estrays, and the like, these will not pass by the grant of those other things; and therefore if one have a warren in his land, and grant the land, by this the warren doth not pass. And yet if in these cases, he grant the land *cum pertinentiis*, or with all the profits, privileges, &c.

‡ The exposition of the several parts of the deeds of grant. And how the words and sentences therein shall be taken.

1. In the premises, and what doth pass by the grant of a thing.

Co. super Lit.
152. Lit. sect.
372. 229. Co.
4. 86. 87. 3 H.
7. 4. Bro.
Grant. 86. 144.
43 Ed. 3. 22.
Co. 10. 64. Co.
super Lit. 307.

(m) And this by operation of law; for if a man grants a piece of ground in the middle of his, he at the same time impliedly grants a way to come at it, and the grantee may cross the grantor's land for that purpose without trespass; and if the grantee is obstructed he has a remedy by action of nuisance, or on the case. F. N. B. 183.

(n) And the grantee may come with carts over the land of the grantor to carry them away. 11 Co.

(o) And he may justify doing so; but he cannot justify the digging a trench to let the water out to the fish, for he may take them by nets and other devices; but if there were no other means to take them he might then dig a trench. Finch's Law, 63.

(p) Attornment, now unnecessary, see the act of the 4 Ann. c. 16.

(q) An advowson in gross will pass by force of the word "tenement" or "hereditament," but not the words "commodities, advantages, or emoluments, to, &c. belonging." See Hob. Rep. 303. thereunto

thereunto belonging; by this grant perhaps these things may pass (r). And here know, that a reversion may be parcel of, or appendant to, a thing in possession, and pass by the grant of it; but a possession cannot be parcel of, or appendant to, a thing in reversion. And therefore if one make a lease for life of a manor, excepting twenty acres of it, and after grant the reversion of the manor; by this grant the twenty acres will not pass. So if one be disseised of an acre, parcel of a manor, or of common appendant to the manor, and before an entry or recontinuance of the acre, or common, he grant the manor to a stranger; by this the acre of land, or common, will not pass: but otherwise it is in case where a lease for years only is made, of a parcel of the manor. And if a lease be made for life, of twenty acres, parcel of a manor, and after the manor itself is granted; by this the reversion of the twenty acres is granted and will pass also.

38 H. 6. 38.
Co. 11. 47. 50.
Plow. 103.
Bro. Grant.
60. 129. Co. l.
7. 28.

* P. 90.

And if a man make a feoffment in fee of an acre of land parcel of a manor, and after repurchase it, and then grant the manor; this acre will not pass by this grant; for it is not united by the new purchase (s). But it is otherwise of trees; for if a man make a lease for life of a manor, or other land, excepting the trees, and after grant the reversion of the manor, or land, to another; hereby the trees do pass. And if a man make a feoffment in fee of a manor, excepting the trees; and after, the feoffee buy the trees, in this case the trees are united again, so that if the feoffee sell the manor, the trees shall pass with it. If I lease an acre of land to which an advowson is appendant, for term of life, reserving the advowson, and after do grant the reversion of that acre with the appurtenances; hereby the advowson doth not pass (t). But if I grant the advowson for term of life, reserving the acre, and after grant the acre, with the advowson, *cum pertinentiis* (u); by this the advowson doth pass. If land be appendant to an office, there by grant of the office with the appurtenances, the land will pass without livery of seisin. And if an office be appendant to land, there by the grant of the one, the other will pass. 3. That which is parcel or of the essence of a thing, albeit at the time of the grant it be actually severed from it, doth pass, by the grant of the thing itself. And therefore by the grant of a mill, the millstone doth pass, albeit at the time of the grant it be actually severed

14 H. 8. 25.
Co. 11. 50.

(r) If the language should be "with the profits, privileges, &c. thereto belonging or in any wise appertaining, or accepted, deemed, taken, or considered to be part, parcel, or member thereof, or appurtenant, or appendant thereto," in that case there can be no doubt but such things would pass. This therefore shews the importance of making use of the general words in grants and conveyances of real estates.

(s) Lands once severed from a manor cannot be re-annexed to or become parcel of it again, yet if they are reputed as parcel of it they would pass in a conveyance of the manor under the general words "all lands, meadows, &c. thereto belonging or appertaining, or reputed or deemed as part, parcel, or member thereof or appurtenant thereunto." See Vin. Abr. Manor.

(t) When an advowson shall be *appendant*, or in *gross*, see in Com. Dig. Advowson (B). and further what shall be deemed to pass as appendant, appurtenant, or incident, in Bac. Abr. Grants (I. 4).

(u) See Moore, 682, as to what may pass by force of the word "appurtenances."

from

14 H. 8 1. Co.
super Lit. 4.

12 H. 7. 25.

Plow. 289.
19 H. 6. 4.

Co. super Lit.
301. Lit. sect.
543. 544.

Co. super Lit.
5. 6. Co. 4. 88.

Co. super Lit.
6. 16. Perk.
sect. 114. 115.
11 H. 6. 22.

from the mill. So by the grant of a house, the doors, windows, locks, and keys, do pass as parcel of it, albeit at the time of the grant they be actually severed from the house. 4. By the grant of the land, or ground itself, all that is *supra*, as houses, trees (w), and the like is granted; for *Cujus est solum, ejus est usque ad cælum*; also all that is *infra*, as mines, earth, clay, quarries, and the like (x). And by the grant of a house, the ground whereon it doth stand doth pass (y). 5. When any matter of interest, or profit, is granted, the grant shall be taken largely: but when any matter of ease, or pleasure only, is granted, as a walk, or the like, the grant shall be taken strictly. 6. When a man doth grant all his lands, or all his goods; by this grant doth pass not only what he is sole seized, or possessed of, but also what he is jointly seized, or possessed of, with another (z). And so *è converso*. If two men join together and grant all their lands, or all their goods; hereby do pass not only all they have jointly and together, but all those they have sole and apart. 7. Some words in deeds are large, and have a general extent; and some have a proper and particular application; the former sort may contain the latter; as *Dedi*, or *Concessi*, may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender: and it is in the election of the party to whom the deed is made, to use it to which of these purposes he will. And hence it is, that if a Lord by the words of *Dedi et concessi* grant to his tenant that doth hold of him, his rent; or one that hath a rent-charge out of land, doth grant it to the tenant of the land; in these cases the rent is extinguished, albeit it be by way of grant. But a release, surrender, confirmation, &c. cannot amount to a grant, &c. nor a surrender to a confirmation or a release, &c. because these be proper and peculiar manner of conveyances, and are destined to a special end.

Amongst words whereby things do pass, some are collective, compound, or general, comprehending many things, as hereditaments, lands, tenements, honors, isles, villages, and the like, including lands of several sorts and qualities. And some words are simple or particular, as meadow, pasture, wood, moor, and the like.

The word [hereditament] is of as large extent as any word, for whatsoever may be inherited, be it corporeal or incorporeal, real, personal, or mixt, is an hereditament. By the grant therefore of all hereditaments, do pass

* P. 91.

The terms, whereby things are granted, expounded.

Hereditament.

(w) Unless the right to the trees is in another person; for one man may have the inheritance in the soil and another in the trees.

(x) Land being *nomen generalissimum*: whereas by the name of a messuage, castle, or the like, nothing will pass but what falls with the utmost propriety under the term made use of. Co. Lit. 4 a. But see next note, and *infra* page 92.

(y) The curtilage, or close or ground in which the house stands will pass along with the house by the grant of the house merely, (2 Bulst. 113. 14 Vin. Abr. 319; and see *infra*, page 94.) as well as the ground whereon the house actually stands.

(z) Where a man grants all his goods and chattels, not only those pass whereof he is solely possessed or jointly possessed with another, but those also which he is possessed of in right of another, as a term of years which he has in right of his wife, or goods which he has as executor. Roll. Abr. 56. Grants (X). 1 Leon. 263.

honors,

- honors, isles, castles, seigniories, manors (a), messuages, lands, meadows, pastures, woods, moors, marshes, furses, heaths, reversions, commons, rents, vicarages, advowsons in gross, and the like things, which the grantor hath in fee simple at the time of the grant, whether he hath it by purchase or descent (b). And the word [tenement] is of large extent also, and it seems doth comprehend as much as the former. And therefore by the grant of all tenements, will pass, as much, as by the grant of all hereditaments.
- Tenement.**
- Land.** The word [land] strictly doth signify nothing but arable land; but in a larger sense it doth comprehend any ground, soil, or earth whatsoever. And therefore by the grant of all lands, do pass arable lands, meadows, pastures, woods, moors, waters, marshes, furses, heath, and such like, and the castles, houses, and buildings thereupon; but not rents, advowsons, and such like things. Also by grant of any land in possession, the reversion thereof will pass. And yet by the grant of a reversion of land, the land in possession will not pass.
- Note.** But here it must be observed, that in cases of grants, and gifts of all hereditaments, tenements, or lands, consideration is had of the estate of the grantor: for if a man be seised of some lands in fee, and have other lands for life, or years, only, and all these are lying within one parish, and he grant all his lands, tenements, or hereditaments in this parish, to another in fee simple, fee tail, or for life, * and give livery of seisin in the lands whereof he is seised in fee, in the name of all the rest; by this doth pass no more but his lands whereof he is seised in fee; for otherwise it would be a forfeiture for those lands (c). But if the livery of seisin be made in any part of the lands he hath for life or years, then that part wherein the livery is made will pass, and no more. And if the conveyance be by bargain and sale, and deed inrolled, then the lands whereof he is seised in fee simple, and for life, shall pass, and not the land he hath for a term of years (d). And yet if in this case the grant be for years, then all the lands will pass, for then there will be no forfeiture in the case. Howbeit it is said in *Bro. Done*, 41. *pro lege*. That if a man give or grant all his lands and tenements in *B.* by this, leases for years do not pass, and that these words do intend frank-tenements at the least (e).
- * P. 92.
- Forfeiture.**
- Forfeiture.**

Bro. Grant.
143. Co. super
Lit. 6. Perk.
sect. 114.

Co. super Lit.
4. Co. 4. 891.
Perk. sect.
114.

Co. 11. 47. 50.
10. 107.

Edw. case
Mich. 9 Jac.
Curia 9 H. 7.
25. Bro.
Grant. 87.
11 H. 6. 22.

These

(a) There is no question but a manor may pass by the word "hereditament," per Lord Hardwick, in *Norris and Le Neve*, 3 Atk. 82.

(b) Therefore an heir loom, though neither land nor tenement, but a mere moveable, yet being inheritable is comprised under the general word "hereditament;" and a condition, the benefit of which may descend to a man from his ancestor is also an hereditament. 5 Co. 2.

(c) See supra, page 88, note (i).

(d) See supra, page 88, note (i).

(e) *A.* possessed of lands for a term of 999 years, did for valuable consideration, by lease and release, grant, bargain, sell and demise, to trustees and their heirs, to the use of himself and his wife for their lives and the life of the survivor of them, remainder to the heirs of the wife, and covenanted that he was seised in fee; the wife died without issue, having made a writing in the nature of a will and devised the premises to *B.* and his heirs. Lord Chancellor was of opinion, that though the settlement could not operate as a lease and release, yet *A.* being in possession, and the word "granted" being

Co. super Lit.
5.

These words [*Honor, Isle, and Commote*] are compound words and of large extent. And therefore, by the grant of them, may pass one or more seigniories, manors, and divers other lands. Also a castle may contain one or more manors. And therefore by the grant of a castle, may pass one or more manors. And so sometimes *à converso* a castle may pass by the grant of a manor. But by a castle most commonly is signified no more but the house or building, and the parcel of ground inclosed wherein it doth stand (f).

Honor. Isle.
Commote.
Castle.

Plow. 169.

Co. super Lit.
5. Plow. 168.

This word [village or town] is of large extent also. And by the grant of it, a manor, land, meadow, and pasture, and divers such like things may pass.

Town or vil-
lage.

Co. super Lit.
5. 58. Perk.
sect. 116. Co.
5. 11. Plow.
168. Dyer 233.
14 H. 8. 1.
9 Jac. B. R.
Dier 30, 8 H.
7. 4.
Bainton's
case, M. 9.

This word [manor] is a word of large extent, and may comprehend many things. And therefore by the grant of a manor, without the words of *cum pertinentiis*, do pass demesnes, rents, and services, lands, meadows, pastures, woods, commons, advowsons appendant, villains regardant, courts baron, and perquisites thereof, that are in truth at the time of the grant parcel of the manor. * But nothing that in truth is not parcel of the manor, albeit it be so reputed, will pass by the grant of the manor; and therefore if one have a manor, and after purchase the law-day (g), or a warren to it, and then he grant away the manor, hereby the law-day, or the warren, will not pass. And yet if by union time out of mind, they have gotten a reputation of appendancy, perhaps by the grant of the manor *cum pertinentiis* these things may pass (h). * By the grant of a manor, also divers towns may pass. An honor also may pass by this name. And so also may a castle, or a hundred. And one manor also, that is parcel of another manor, may pass by the grant of that manor, whereof it is parcel.

Manor.

* Co. super
Lit. 5. 26. Ass.
Plow. 54. 2 E. 3.
36.

Co. super Lit.
5. Plow. 168.
17 E. 3.

The word [knight's-fee] is a compound word also, and may comprehend many things. And therefore by the grant of this may pass land, meadow, and pasture, as parcel of it. And sometimes * by this, doth pass so much land as to make a knight's fee. And some say it doth contain eight hides of land. And it seems also that a manor may pass by this name, if it be usually called so.

* P. 03.

Co. super Lit.
5. Plow. 167.

The word [grange] is a compound word also, and by the grant of a grange, will pass a house, or edifice, not only where corn is stored up, like as in barns, but necessary places for husbandry also, as stables for hay, and horses, and stables and sties for other cattle, and a curtilage, and the close wherein it standeth, at the least. And where land, meadow, and pasture, &c. belonging to such houses

Grange.

In the release, it took effect as a grant or assignment of his whole interest at common law: and though it would not go to the heirs of the wife, yet it should go to her administrator it being clearly the husband's intention to divest himself of all his interest in the estate. *Marshal v. Frank*, Gilb. Eq. Rep. 441. Prec. in Chan. 490. S. C.

(f) See accordingly 2 Inst. 31. and further as to a castle, in *Mad. Baron. Anglic.* 17.

(g) *Lawe-day*, alias *dicatur de visu franci plegii*; vulgo *leta*: alias *de curia comitatus, juxta stat. An.* 3 Edw. 4. c. 2. 8. p. Gloss. This law-day or lage-day was properly any day of open court, and commonly used for the more solemn courts of a county or hundred. *Cow. Interp.*

(h) See *supra*, page 89, note (r).

	are called all together by the name of a <i>grange</i> , there perhaps by this word the whole may pass (i).	
Farm.	The word [farm or ferm] called in Latin <i>firmæ</i> , is also a compound word, and doth comprehend many things. And therefore by the grant of a ferm, will pass a messuage and much land, meadow, pasture, wood, &c. thereunto belonging, or therewith used: for this word doth properly signify a capital, or principal messuage, and a great quantity of demesnes thereunto appertaining. Also by the grant of all farms, or all forms, it seems leases for years do pass.	Co. super Lit. 5. Plow. 175. Bro. Grants, 155.
Oxgang of land.	The word [oxgang] is a collective word also, for by the grant of <i>unam bovatum terræ</i> , or of an oxgang of land, may pass land, meadow, and pasture, and it doth properly intend as much as an ox can till. And <i>jugum terræ</i> , or half a plow-land, is as much as two oxen can till, and by the grant of half a plow-land, may pass meadow, and pasture.	Co. super Lit. 5.
Half a plow-land.		
A plow-land or a hide of land.	The words [plow-land, and a hide of land] are <i>synonyma</i> , and are collective words also. And therefore by the grant of <i>carucatum</i> or <i>hidam terræ</i> , or of a plow-land, or of a hide of land, may pass one hundred acres of land, meadow and pasture, and the houses thereupon; but it doth properly intend as much land as one plow can till in a year.	Co. super Lit. 5. Plow. 167.
A yard of land. Half a yard-land.	This word [a yard-land] is also collective, and doth comprehend many things, but it is not certain; for in some countries it doth contain twenty acres, and in some countries twenty-four acres, and in some countries thirty acres; by the grant therefore of <i>virgatum terræ</i> , or a yard-land, will pass that quantity of land, meadow and pasture that is called by this name. And so by the grant of half a yard, or a quarter of a yard-land (k).	Co. super Lit. 5.
Fold course.	The word [fold course] is also compound, for by the grant of a fold course, land and tenements may pass, <i>et sic de similibus</i> . And finally by the grant of any such compound thing as before, for the most part there doth pass thereby so much as in common reputation is accounted part of that thing, and is usually called by the name (l).	Co. super Lit. 6. Plow. 167.
Parsonage, rectory, vicarage. * P. 84.	By the grant of a rectory or parsonage will pass the house, the glebe, the tithes, and offerings belonging to it. And by the grant * of a vicarage will pass as much as doth belong unto it, as the vicarage house, &c. (m).	2 H. 7. 1. Bro. Grants, 86.
Messuage. Cartilage.	By the grant of a messuage, or a messuage with the appurtenances, doth pass no more than the dwelling-house, barn, dove-house, and buildings adjoining, orchard, garden,	Plow. 85. 15. 171. 178. 569. Lit. Bro. sect.

(i) Under the general words "all lands, meadows, pastures, &c. to the said messuage belonging, or in any wise appertaining, or deemed or considered as part or parcel thereof," there is no doubt it is conceived but the lands would pass. See *supra*, page 89, note (r).

(k) There are no certain number of acres contained in a hide or plow land, or yard land, or an oxgang of land. Co. Lit. 69 a. 2 Inst. 596.

(l) As to the dimensions of land in England, see the books referred to in note 11 to Co. Lit. 5 a 13th edit. and if the reader is desirous to investigate the etymologies of the several words by which things will pass in conveyances, he will find the proper books pointed out in note 3 to Co. Lit. 6 a 13th edit.

(m) By the grant of a rectory or vicarage, every thing belonging to it must, it is conceived, necessarily pass. They are, in fact, inseparably annexed to it, and therefore must of necessity pass with it.

31. 185. Co.
super Lit. 5.
Co. 10. 65.
Edw. 57.
27 H. 6. 2.

and curtilage, *i. e.* a little garden, yard, field, or piece of void ground lying near and belonging to the messuage, and houses adjoining to the dwelling-house, and the close upon which the dwelling-house is built, at the most. And so much also may pass by the grant of a house. So that the quantity of an acre of ground, or thereabouts, in orchard, garden, and outlet, may pass by either of these names; but more than this will not pass by the grant that is made in either of these words, albeit more have been occupied with it, and albeit more be intended to be passed by the grant. And therefore if there be a messuage or dwelling-house, and divers acres of land thereunto belonging, called all together by the name of hedges, and a grant is made by these words, of all that messuage with the appurtenances commonly called by the name hedges; by this grant nothing shall pass but the messuage, garden, and curtilage. ^a And yet if a manor, or farm, be commonly called by the name of a messuage, there by the grant of a messuage the whole manor, or farm, may pass. ^b And by the grant of a messuage, or house, and all the lands thereunto appertaining, will pass all the land usually occupied therewith. Also by the name of a messuage, a chapel, or an hospital may be granted.

^a See before.

^b Lit. Bro.
sect. 185. 160.
Bro. Leases,
55. Plow. 170.
c. 13. Ass. Pl.
2. Co. super
Lit. 4.

By the grant of a cottage, doth pass a little dwelling-house that hath no land belonging to it. Cottage.

By the grant of all a man's arable land, there doth pass no more but that kind of land: and by the grant of all a man's meadow ground, or all a man's meadows, doth pass no more but that kind of ground. And by the grant of all a man's pasture, doth pass no more but the land or ground itself employed to the feeding of beasts, and also such pastures and feedings as he hath in another man's soil.

Arable land,
meadow, pas-
ture.

14 H. 8. 1.
Perk. sect.
116. Co. 5. 11.
Br. Done, 24.

If a man have divers acres of pieces of wood, and grant to another *omnes boscos suos*, or all his woods, or all his woods growing in such a place; by this grant doth pass all the highwood and underwood, and not only the wood growing upon the land or soil, but the land or soil itself wherein it doth grow. But in this case if the grantor have in the same place divers pieces of wood, and divers closes, wherein there are divers trees growing in the hedges; it seems in this case these trees in the hedges shall not pass by this grant in these words; especially if the case be so that the cutting of them will be a waste. And yet if the grantor have no pieces or groves of wood in the place, nor trees but what are growing in the hedges and grounds, in this case it seems all the trees, except the apple trees, do pass, but not his hedges and hedge rows. And in ^c case where the trees only do pass, as where the grant is of all a man's trees, there shall pass no more of the soil but so much as shall serve for the nutriment of the trees, and the owner of the soil shall have the grass growing thereupon also. If a man grant to another all his saleable underwoods within his manor, which have been usually sold by the owners of the manor, with free entry, egress, and regress, for selling, making, and carrying the same away at all times convenient; in this case it seems the soil doth

Wood trees.

Co. 5. 43. 11.
20.

^c P. 95.

Curia Hilt.
16 Jac. B. R.
Pichcomb's
case.

not

not pass but the wood only. And yet if those words with free entry, &c. be omitted, *contra* (n).

If one demise, grant, and to term let, a farm with all manner of timber-wood, underwood, and hedge rows, except the great oaks in such a close, to have and to hold the farm for twenty-one years; in this case, albeit there be the word "grant," and that the trees be not named again in the *habendum*, yet the other trees do not pass by this grant, otherwise than in other leases, and if the lessee cut any timber to sell, it is waste in him.

Dier 374. Co. 11. 48.

Toft.

A toft is a place where a message hath stood, and by this name in a grant such a thing will pass.

Bruera. Frus-
actum. *Alne-*
tum. *Salicetum*.
Selda. *Filice-*
tum. *Fraxine-*
tum. *Lupulice-*
tum. *Arundine-*
tum. *Roncaria*.
Juncaria, *Rus-*
caria, *Maria-*
cus. *Mora*.

Bruera is a heath, or heathy ground. *Frassetum* is a wood or piece of ground that is woody. *Alnetum* is a wood of elders, or place where elders grow. *Salicetum*, a wood of willows, or place where willows grow. *Selda*, a wood of sallows, willows, or withies, or place where such things grow. *Filicetum* is a braky ground, or place where such things as fern grow. *Fraxinetum*, a wood of ashes, or place where ashes grow. *Lupulicetum*, a hop-yard, or place where hops do grow. *Arundinetum*, a place where reeds grow. *Roncaria* or *Runcaria*, a place full of briars or brambles. *Juncaria* or *Joncaria* or *Siampna* (which are all one) a place where rushes do grow. *Ruscaria*, a place where kneeholm, or butchers pricks, or broom doth grow. *Mariscus*, a fen or marsh ground. *Mora*, a more barren and unprofitable ground than a marsh. And by grant of these, and such like things, or of twenty acres of such ground, these particular kinds only or so many acres thereof do pass. *Vicaria*, is a dairy-house. *Porcaria*, a swinesty. *Bercaria*, a tanhouse: and by these names these things will pass. By the name of *Stagnum* a pool, or *Gurges* a gulf, the water, land, and fish in the water will pass.

Co. super Lit. 4. 5.

Vicaria. *Porca-*
ria. *Stagnum*.
Gurges.

Co. super Lit. 5.

Stadium. *Fer-*
lingus. *Quaren-*
tens terra.
Sello terra.
Acre of land.
Rood of land.

By the grant of *Stadium*, *Ferlingus*, or *Quarentena terra*, doth pass a furlong or furrow long, which anciently was the eighth part of a mile. By the name of *selio* or *porca terra* doth pass a ridge of land, which is sometimes longer, and sometimes shorter. By the grant of an acre of land, doth pass so much as is an acre by measure in that country, by the ordinary account and measure of the country. By the grant of a rood of land, doth pass ten perches * the fourth part of an acre. And by the grant of six foot in length and two foot in breadth, so much only doth pass. And by these, and such like names, land may be granted.

Co. idem.

* P. 96.

Mines.

By the grant of *Mineras* or *Fodinas plumbi*, &c. or mines of lead, &c. the land itself will pass, if livery of seisin be made thereof; but otherwise it seems not, and then the grantee hath by the grant a power to dig only, granted unto him.

Co. super Lit. 6. Co. 4. 12.

Trench.

If one grant to me to dig a trench in his ground, from such a place to such a place, to convey water by a lead pipe, or otherwise; hereby also *inclusive* is granted a

Perk. sect. 111.

(*) Quere whether these words can make any difference in the nature and operation of the grant?

liberty at any time after to dig to amend it as occasion shall be.

Co. super Lit.
4.

If one grant to me to dig turfs in his land or soil, and to Turfs.
carry them away at my will and pleasure; by this is not
granted the land itself, the houses or trees thereupon, or
mines therein.

Co. super Lit.
4. Perk. sect.
108. 109.

If one grant to another, common for all his beasts in his Common.
land; hereby is not granted common for goats, pigs, and
such like beasts and cattle that are not commonable. But
if the grant be of common for all manner of beasts, *contra*.
And if one grant to another, common without number in
his land, the grantor is not hereby excluded to common
there with the grantee.

And if one grant to me, common of pasture for ten kine
in his lands in *Dale*; by this grant I shall have common
in his commonable grounds and lands only, and not in any
other lands. And if a man grant common of pasture to
me, for my beasts *ubicunque averia sua ierint*, and he
occupy one hundred acres of land with his beasts, and
after he keep no beasts; yet by this grant I may keep my
beasts in those one hundred acres. But if he grant to me
common of pasture for my beasts wheresoever his cattle
shall go, &c. by this grant I shall have no common but
when the grantor doth use his common with his cattle, &c.

Perk. sect.
116.

By the grant of estovers, will pass, houseboote, hay- Estovers.
boote, and plowboote. But if a man grant to me estovers
out of his manor, I may not by this grant cut down any of
the fruit trees within his manor (o).

14 H. 8. 1.
* Clar. case,
Trin. 5 Jac.
B. R.

If land be granted to me; hereby also implicitly is a Way.
way thereunto granted to me also. * So that if one have
twenty acres of land, and grant me one acre in the midst

* Per Williams
& Yolverton,
Justices. Mic.
5 Jac.

of it, hereby *inclusive* there is granted me a way to it.
And yet if a man have two closes, and he use to go over
one of them for his ease, to the other close, by a new way,
and after he grant the further close *cum pertinentiis*; by
this grant the new way doth not pass.

Co. super Lit.
5. Rice &
Wiseman's
case, Mich.
9 Jac.

If a man have a forest, park, chase, vivary, or warren Forest, park,
in his own ground, and he grant this forest, park, chase, chase, warren.
vivary or warren; hereby not only the privilege, but the
land itself doth pass. But if the ground be another's; or
if it be his own, and the grant * be only of the game, &c.
in these cases, the land, or soil itself, will not pass.

* P. 97.

Co. super Lit.
4.

If a man be seised of a river, and by his deed doth grant Fishing.
separalem piscariam, or *aquam suam* in the same, and
maketh livery *secundum formam chartae*; by this grant
doth pass only a liberty to fish within the water, and not
the soil, nor the water itself: and therefore the grantor
may take water still; and if it be dry, he may take the
soil also. And if one grant all his fish in his pond; by this
is granted a power to come and fish for them; but the
grantee may not hereby dig a trench and let out the water
to take the fish, albeit they may not be otherwise taken (p).

Fitz. Barre.
237.

(o) For the nature and different kinds of estovers, see Co. Lit. 41 b. the same estovers that tenant
for life may have, tenant for years shall have.

(p) See *contra*, page 89, note (o).

Vesture or herbage of land.

If one be seized of twenty acres of land, and he grant to another and his heirs the vesture, or the herbage of it, and maketh livery of seisin in it *secundum formam chartæ*; by this grant do pass the corn, grass, underwood, sweepage, and the like; and for these things the grantee may have an action of trespass for any wrong done to him in them. But hereby the land itself, the houses, and great trees thereupon, and mines therein, do not pass. And if one grant the herbage, or vesture of a wood; hereby is granted the grass and underwood only, and not the timber of great trees. But if a man, so seized of twenty acres of land, grant to another the profits of this land, to have and to hold to him, and his heirs, and maketh livery *secundum formam chartæ*; hereby the vesture, herbage, trees, mines, and all whatsoever parcels of that land, do pass.

Co. super Lit.
4. Dier 283.
Trin. 5 Jac.
B. R. accord.

Profits of land.

Deeds.

If one grant to another all his deeds, or all his muniments; hereby will pass all his charters, scotfments, leases, releases, confirmations, letters of attorney, and the like.

35 H. 6. 37.

Goods.

If one give or grant to another *omnia bona*, or all his goods; by this do pass all his moveable and immoveable, personal and real goods, as horses, and other beasts, plate, jewels, and household stuff, bows, weapons, and such like; and his money, and his corn growing on the ground, also all the obligations and bills that are made to him, and in his own name, do pass by this, but not the debts due by such obligations and bills (q). And some say that leases and terms of years of houses, lands, rents, commons, &c. rents charge for years, wardship of tenants *in capite*, and by knights service, and the interests that a man hath by statute staple, statute merchant, or *elegit*, do pass by this grant; but of this, others doubt. And if a man give or grant to another *omnia catalla sua*, or all his chattels; hereby doth pass as much as by the grant of all his goods, and by this without question leases for years, &c. do pass (r). But by neither of the grants do pass those goods or chattels which the grantor hath by delivery, in keeping for another, or the like. Neither doth any estate of inheritance or freehold, or the charters concerning any freehold, pass under * these words. * Neither doth any thing in action (s), as debts or the like, nor hawks, hounds, poppinjaws, or the like, pass by this grant. ^b And yet if ^b Adjudged,

Co. super Lit.
118. 39 H. 6.
35. Dier 59.
Perk. sect.
115. 12 H. 2. 4.
Bro. Grant.
96. 51. Done
39. 47. Dier 5.
Co. 8. 35.

Chattels.

* P. 98.

^a Per Ch. Just.
B. R. 21 Jac.

^b Adjudged,

(q) If a man has an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, *viz.* the parchment and wax to another, who may cancel and use the same at his pleasure, Co. Lit. 252 b. Money due on bond, is a *chose in action*, so called, because, though the property in a debt vests at the time of forfeiture mentioned in the obligation, yet there is no possession till recovered by a due course of law. A *chose in action* strictly is not assignable at law. Co. Lit. 214. 266 a. And after an assignment of a bond, if an action is brought on it, it must be brought in the name of the obligee; and for this reason, the power of attorney, and covenant that the assignor (the obligee) will not release, in case an action is brought, are inserted in the assignment of the bond. But though a *chose in action* cannot be assigned to a common person, yet it may be to the king, 1 P. W. 252. The king may by his prerogative assign a *chose in action* to A. and it will be a good assignment; but if A. assigns it over to any other person, that assignment will be void. Cro. Jac. 130. A court of equity however will protect an assignment of a *chose in action*. 3 P. W. 200.

(r) Leases for years do not pass by a grant of *omnia bona*; but otherwise in a will, the civil law being the guide; by two judges against one, Cro. Eliz. 386. *Portman v. Willis*.

(s) Though things in action will not pass at law by the grant, yet in equity they will. See *Rye v. Bell*, 1 Atk. 164.

3 Jac. Kelw.
64. 10. Co. 4. 1.
Per Flemming
Just. 7 Jac.
B. R.

an executor grant *omnia bona & catalla sua*; hereby the goods and chattels he hath as executor, as well as his other goods and chattels, will pass. And if one grant all his leases for years which he hath by any conveyances; hereby the leases for years which he hath as executor, as well as other leases for years, will pass.

Dier 59.

If one grant to another all his utensils; hereby will pass all his household stuff, but not his plate, jewels, or any such like thing. Utenails.

Co. super Lit.
345. Lit. sect.
613. Plow.
161. Co. 1. 153.

If a man be seised of land in fee-simple, or for life, and have an estate in it for years, by statute merchant, staple, *elegit*, or the like; and he grant all his estate, or all his right, or all his title, or all his interest of and in the land; by this grant, all his estate, and as much as he is able to grant, doth pass (t). And if tenant for life of land, the remainder to the stranger in tail, the remainder to the right heirs of the tenant for life, do grant by these words; hereby both his estates do pass. And if a tenant in tail grant all his estate in the land; hereby there doth pass as much as he can grant. And all these words also do carry and pass reversions, as well as possessions. And if a man have a term of years of land, and he grant his term; hereby doth pass the term of years, and all his estate and interest of the land.

Grant of all a
man's estate,
right, &c.

Fitz. Brief,
381.

And note, that by all these names these things may be granted; and that for such things as are grantable without deed, when they pass by a verbal grant in any of these words, the words shall have the same exposition as they have in deeds. Note.

H. 6.

If one grant all his goods in such a place *si quæ fuerint*; by this grant nothing doth pass but the goods that are in such a place at the time of the grant, and not any other goods that shall be there afterwards.

Bro. Dene, 10.

If two men have goods in common, and have other goods severally, and they give me all their goods, by this grant is given all their goods they have in common, and likewise all the goods they have in severalty.

Plow. 171. 140.
Co. 19. 106.

If two tenants in common, or others severally seised of land, join in the grant of a rent of twenty shillings, or a horse, out of the land whereof they are so seised; by this grant the grantees shall have two twenty shillings, or two horses (u).

Bro. Grant. 64.

If a man grant a rent of ten pound to me, to have and to hold during my life and my wife's life, and after the death of my wife, a rent of three pound to me for my life; in this case, if my wife die, I shall have both the rents. But if there be any words of restraint or determination of the first rent, it may be otherwise.

Adjudged, M.
20 Jac. B. R.
Berton v.
Brown.

If one seised of a garden plot in the parish of *Salé*, and grant it to *B.* for ten years, which being expired, he doth grant his garden plot to *C.* for twenty-one years, and

P. 99.

(t) But to pass the fee-simple lands absolutely, appropriate words must be made use of in the grant, as to the grantee and his heirs.

(u) This is according to the maxim of law, that every man's grant shall be taken, by construction of law, most forcibly against himself, Co. Litt. 183 a. But if they reserve twenty shillings upon a lease, they shall have only one twenty shillings. Finch's Law, 63.

C. doth build a house upon part of it, and leaveth the other part in a garden plot still, and after the twenty-one years ended, the lessor doth grant to *D.* *totam illam peciam fundi sive gardin' plott' nuper in tenura de B. & nunc de C.* lying in the parish of *Sale*, by this grant, the house newly built, and the plot of garden doth pass.

If one grant his manor of *Dale*, in *Dale*, which in truth doth extend into *Dale* and *Sale*; in this case no part of the manor that doth lie in *Sale* shall pass. So if one grant all his tenements in *Dale*; hereby none of the tenements in *Sale* will pass. So if the manor lie within the parishes of *A. B.* and *C.* and the grant is of the manor of *Dale*, lying within the parishes of *A.* and *B.*; by this grant no part of the manor lying in *C.* will pass (*w*). But if one seised of the manors of *A.* and *B.* in the county of *C.* grant thus, *totum illud Manerium de A. & B. cum pertinet in com' C.* or *totum illud Manerium de A. cum B. in com' C.* by these grants, in case of a common person, both the manors will pass.

Bro. Grant, 33.
88. Done, 26.

Co. 1. 46.

If one grant all his lands in *Dale*, which he had of the gift of *I. S.*; by this grant nothing will pass but that which he had of the gift of *I. S.* But if one grant all his lands in *Dale*, called *Hodges*, which he had of the gift of *I. S.* by this grant all that which is called *Hodges* shall pass, albeit the grantor had it not of the gift of *I. S.*

Bro. Grant.

If one grant all his lands in the occupation of *I. S.*; by his grant doth pass not only such lands as *I. S.* doth occupy by right, but also such lands as he doth occupy by wrong, and not only the lands whereof he hath some estate, but also such lands as whereof he hath the pasturage only.

Dockraies' case, Pasch.
12 Jac.

If one grant all his lands in *B.* and elsewhere in the county of *S.* in the tenure of *I. S.* by this grant, nothing doth pass but that which is in the tenure of *I. S.*

2 Jac. Br.

If one grant his manor of *S.* *nec non omnes mariscos suos de S. ac omnia terra, tenementa, &c. in S. & alibi dict' Maner' spectan'*; by this grant the marsh doth pass, though it be no part of the manor.

Adjudged,
Seignior West-
worth's case,
Co. 1. 46.

If one grant all his demesne lands of his manor of *Dale*, &c. it seems by this the customary land parcel of the manor, held by copy, doth pass.

If one be seised of tithes which did belong to an abbey, part of which were gathered by the almoner, and part not, and he grant *omnes & omnimodas decimas granorum, &c. infra dominium predict' & precinct' ejusdem, in dict' Comit', ac omnes alias decimas, proficua & commoditates, &c. infra dominium predict' & dict' Monaster', &c. spectan' & quæ nuper per Eleemozinar' ejusdem Monasterii collect' fuer'*; by this grant shall pass, all the tithes, as well those that were collected by the almoner, as those which were not, and those words *quæ per Eleemozinar', &c.* shall refer only to the last, and not to both sentences.

Adjudged Hil.
2 Jac. B. R.
Baker's case.

*P. 100.

(w) As it seems that a manor may be severed by the act of the party, at least where the lord can hold his court in any part of the manor, (see Cro. Eliz. 18 & 39, and 1 Leon. 26; but also see Warb. on Cop. 16), the above doctrine is probably a sound one, provided it was clearly the intention of the parties that the entirety of the manor should not pass; but on the other hand if the intention clearly was, that the entirety should pass, then probably the words of restraint would be considered as repugnant to the operation of the words "all that the manor of *Dale*" generally.

Dier 70.

If one grant all his lands in *D.* containing ten acres, whereas in truth his lands there do contain twenty acres; by this grant the whole twenty acres will pass.

Dier 70.

If one grant the soite of an abby, & *omnia terras præpasturas & subscript' cum pertinen' dict' Monaster' pertinen'* &c. viz. such a thing, and such a thing, &c. by this grant, the grantee shall have all the lands belonging to the monastery, and viz. shall relate to *Subscript'* only, and not to *omnia*. See more in Grant, *infra*, numb. 4. and in Testament, at numb. 8. and in Fine, at numb. 3.

Ca. 10. 106.
14 H. 8. 1. 11.
52.

The exception is always taken most in favour of the feoffee, lessee, &c. and against the feoffor, lessor. And yet it is a rule, that what will pass by words in a grant, will be excepted by the same words in an exception. And it is another true rule, that when any thing is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his chapman to view them if he desire to sell them, and he, or the vendee, may cut them, and take them away. And by such an exception, the lessor will have the boughs, fruit, herons, and hawks, that breed in them, &c.

In the exception, and how that shall be taken:

1. In the thing excepted.

Perk. sect.
646. Fitz.
Assis. 316.

If a man be seised of a fishing from such a place to such a place, and hath a mill upon the water, and he grant *totam partem suam piscariæ de D. quatenus terræ suæ se extendunt, salvo tamen stagno moleculini*: this exception doth not take away the fishing of the grantee in the mill pond; but it shall have relation only to the pool to repair the mill.

Hil. 16 Jac.
B. R. per
Judges.

If a man seised of a manor make a lease of it, excepting all the saleable underwoods, now growing, or which hereafter shall grow on the premises, which have been usually sold by the owners of the manor, with free entry, egress and regress, for the felling, making, and carrying away of the same, at times convenient; in this case, the soil is not excepted by reason of the subsequent words.

Dier 58.

If one be seised of a manor, and make a lease of it *cum pertinen' una cum columbar' ac reddit' tenentium, decimis garbarum, finibus, heriot, perquisit' Cur' & aliis omnibus proficuis, Advocac' Ecclesie & wreck' except'*, in this, the exception doth begin at *Advocac' Ecclesie*, and doth except that also which followeth, and no more.

Dier 264.

If one grant lands in fee, excepting the trees, or any other thing, to the grantor, without saying [and to his heirs:] by this exception, the thing excepted is severed only for the life of the grantor, and then it shall pass with the rest of the things granted. But if the thing be excepted indefinitely, without saying [for the life of the grantor, &c.] nor how long, this shall be taken to be an exception during the estate.

2. In the time-

The *habendum*, as all other parts of a deed, for the most part, shall be taken most strongly against the grantor, and most in advantage of the grantee; yet so as withal it shall be construed as near the intent of the parties as may be, as in all the cases following doth appear.

P. 101.

In the *habendum* of limitation of the estate, and how that shall be taken.

If land be given, or granted, to one *habendum*, or to have and to hold, to him and his heirs, so long as he pay

£20

Fee-simple.

£20 yearly to *I. S.* and his heirs, or so long as such a tree doth stand, or the like; this is a kind of fee simple, but it is limited and qualified, and determinable upon this contingent. And yet this may become a pure fee simple, for if land be granted to one and his heirs, until *I. S.* pay £100 and *I. S.* die before he pay it, in this case the estate is become a pure fee simple.

If lands be given or granted to a man, to have and to hold to him and his heirs, this is a fee simple, pure, absolute, and perpetual; and this is made by these words [his heirs]; for it is a general rule that these words [his heirs] (*x*) only, make an estate in fee simple in all feoffments and grants. But this rule hath many exceptions: for if feoffment of land be made to *I. S.* & *heredibus*, without the word [*suus*] this is a fee-simple: and yet, if the grant be to *I. S.* and *I. D.* & *heredibus*, without this word [*suus*] *contra*, for this is only an estate for their lives (*y*). And if lands be given to a Bishop, Parson, or the like, to have and to hold to him and his successors; this is a fee simple. And if lands be given to a Mayor and commonalty, or other corporation aggregate, generally, without the word *successors*, or any other word, or if lands be given to such a corporation for their lives, this is a fee simple. But if land be given to a Parson, or the like, to have and to hold to him, without saying how long; or to have and to hold for life; by this he hath no more but an estate for life (*z*).^a And if lands be given to the King generally, without any other words; this is a fee simple.^b So if one grant *Deo & ecclesie de D.*; it is said this is a fee simple in the Parson of *D.* So also of a grant *Ecclesia de D. per Thirne Inst.* So if a grant had been to the Monks of such a house, it had been a fee simple in the house. And in like manner it is in other cases: ^cas if one recite, that *B.* hath enfeoffed him of white acre, to have and to hold to him and his heirs, and then he saith further, that as fully as *B.* hath given white acre to him and his heirs, he doth grant the same to *C.* by this *C.* the grantee hath the fee simple of this acre. And if one grant two acres to *A.* and *B.* to have and to hold the one to *A.* and his heirs, and the other to *B.* *in formâ predictâ* (*a*); by this *B.* hath a fee simple in this other acre; for an estate in fee simple, fee tail, or for life, may be made by such words of refer-

Co. super Lit.
8, 9. Lit. 1.
27 H. 8. 5.
Perk. sect.
239, 240, 241.
39 H. 6. 38.
Plow. 28. Bro
Estates, 4.
11 H. 7. 12.
Co. super Lit.
13.

^a Co. 6. 27.
super Lit. 9.
^b 15 Ed. 4. 13.
9 H. 7. 11. 12
H. 8. 9 H. 4.
84. 33 H. 6. 20.

^c Co. super Lit.
9 Ass. pl. 2.
Plow. 130.
14 H. 4. 35.

(*z*) It would appear from what is said by Lord Coke, that the grant must be to him and his heirs in the plural, and that to him and his heir in the singular will not give more than an estate for life; but this doctrine stands opposed by several authorities, and cannot be considered as law; on the contrary it appears to be clear, that the word *heir* in the singular number will operate in a deed as well as in a will in the same way with the word *heirs* in the plural. See T. Jones, 111. Godb. 155. Cra. Eliz. 313. Burr. 4 part, vol. 1. p. 38. Robins. Gav. 95. 2 Vern. 325.

(*y*) According to the more liberal construction which now prevails in the exposition of deeds, there is little doubt but the word *suus* would be supposed to have been omitted by mistake and would be supplied. See *supra*, page 86, note (*d*).

(2) See the distinction between a corporation aggregate and a corporation sole, in respect of the estate they respectively take by a grant in which the word *successors* is omitted, explained in Co. Lit. 94 b.

(*a*) If lands were limited to *A.* for life, remainder to *B.* in tail, remainder to *C.* *in formâ predictâ*, the limitation to *C.* would be void for uncertainty, for it could not be said whether it was intended to give *C.* an estate equal to the one given to *B.* or only equal to the one given to *A.*; but if the limitation to *C.* was *in eadem formâ*, then *C.* would take an estate tail; as the words in *eadem formâ* refer to the estate immediately before limited, viz. the estate tail to *B.* See 1 Inst. 20.

ence.

ence (b). Also if a rent be granted between parceners for to make an equality of partition, and it be granted generally, and without any words of heirs, yet this is a fee-simple (c). So where lands are given in *Frankalmoigne* (d). And so * also it is in the cases of a release of right, a fine and a recovery.

* P. 102.

27 H. 8. 27.
Lit. sect. 31.
Co. 11. 46.

If one give or grant land to another, to have and to hold to him and his heirs males, or to him and his heirs females; in both these cases, there is a fee-simple made (e), but otherwise it is when these words are in a will, for then it is but an estate in tail only (f).

33 H. 6. 5.

If one grant land to one, to have and to hold to him and his right heirs; by this he hath a fee-simple. And so it shall be taken if it be by fine. So if one grant land to *I. S.* for life, the remainder to the heirs, or to the right heirs of *I. S.* this is a fee-simple; so if one make a feoffment in fee to the use of himself for life, and after his death to the use of his heirs; this is a fee-simple.

Co. super Lit.
22. Co. 1. 95.
66.

If one grant land to *I. S.* to have and to hold to him, and the heirs of *I. S.*; this is a fee-simple, and all one with a grant to *I. S.* and his heirs.

20 H. 6. 35.
Co. super Lit.
217.

If one grant land to another, to have and to hold to him for twenty years, and that after the twenty years, the grantee shall have it to him and his heirs by £10 rent, and give livery of seisin: by this the grantee shall have the fee-simple.

Co. 1. 91. Dier
156. Co. super
Lit. 22.

If one grant land to the wife of *I. S.* to have and to hold to her for life, and after to *I. S.* in tail, and after to the right heirs of *I. S.* by this *I. S.* hath a fee-simple (g). And if one grant land to *A.* for life, the remainder to *B.* for life, the remainder to the right heirs of *A.*; by this *A.* hath a fee-simple.

Bro. Estates,
86.

If land be granted to a man and his wife, to have and to hold to them, and the heirs issuing of them, it seems this is a fee-simple, and not a fee tail.

Co. 2. 21. 24.
super Lit. 21.
21 H. 6. 7.

If land be granted to one and his heirs, by the premises of a deed, to have and to hold to him for life; by this he hath a fee-simple (h). So if by the premises of a deed, land

(b) Therefore if a father enfeoffs his son to hold to him and his heirs, and the son enfeoffs the father as fully as the father enfeoffed him, a fee-simple will pass to the father. See 1 Inst. 9 b, a. 6. In construing limitations, they may be construed by inference as well as by reference, especially in wills. Thus where an estate was devised to all and every the child and children of *A. B.* equally, share and share alike, (without saying for what estate) and if there should be but one such child, then to such only child, his or her heirs and assigns for ever; and it was held that all the children took estates in fee, as it was to be inferred that the intention was, that each of the children, if more than one, should take for the same estate as an only child. See *Doe v. Martin*, 4 T. R. 39.

(c) Because the grantor hath a fee-simple, in consideration whereof he granted the rent. Co. Litt. 10 a. Plowd. 134 b.

(d) For the doctrine of *frankalmoigne*, see Co. Litt. 93 b. The statute of 12 Car. 2. c. 24, does not in the least vary the tenure in *frankalmoigne*, but expressly saves it.

(e) See *Abraham v. Twigg*, Cro. Eliz. 478; but see also *Beresford's case*, 7 Rep. 41, which does not exactly accord with the above doctrine.

(f) For the operation of words in a will, as to what estate passes by them, whether in fee, in tail, or for life, see fully in the chapter on Testaments.

(g) A fee-simple in remainder expectant upon the estate tail limited to himself.

(h) But if the *habendum* had been to him for the life of a third person, then it would have been good, as there would have been no repugnancy.—On the subject of repugnancy between the *habendum* and the premises, see *supra*, page 75, n. (a).

If lands be granted to *I. S. et heredibus de corpore procreatis*; by this the heirs that shall be begotten afterwards shall take (y). And if lands be granted to *I. S. et heredibus de corpore procreandis*; by this the heirs of his body before begotten shall take *per formam doni* as well as those that shall be begotten afterwards. Co. super Lit. 30.

If one grant to *I. S.* that if he and the heirs of his body be not yearly paid £40, that he or they shall distrain in the lands of the grantor; by this the grantee hath an estate in tail in the rent: and if he grant to *I. S.* that if he and his heirs be not paid, &c. that he or they shall, &c. he hath a fee simple in the rent (z). Co. super Lit. 146.

If one give or grant land to another, to have and to hold to him for life; or to him and his assigns, and say not how long, nor for what time; and the grantor make livery of seisin according to the deed; by this the grantee hath an estate for his own life (a). But if no livery of seisin be made, no estate at all, but an estate at will, doth pass by this deed (b). And if he that doth grant the land, be but a lessee for years of the land, and he make no livery of seisin upon the grant; by this his term of years, and that estate which he hath, is granted. But if he make livery of seisin upon the grant, then an estate for the life of the grantee will pass, and it is a forfeiture of the estate of 7 Ass. pl. 17.

Forfeiture.

And if one grant to another, common in his land when he doth put in his own beasts, or estovers in his manor when he cometh there, and say no more, by this it seems the grantee hath an estate for life.

P. 106.

If one grant land to *I. S.* to have and to hold to him, or his heirs, in the disjunctive; this is but an estate for life, and no more (c). So if one grant lands to *I. S.* to have and to hold to him, and his heir, in the singular number; by this *I. S.* hath only an estate for life, and no fee simple (d). Co. 5. 112. super Lit. 8.

If one bargain and sell land to another for money, and limit no time, and express no estate; by this the bargainee shall have only an estate for life. But otherwise it was before the statute of uses, for then it had been a fee simple. Co. 1. 67. 130. Plow. 539.

(y) The heirs born before as well as those born after shall take. See supra, page 102, note (1).

(z) See further what words make an estate tail, Com. Dig. Estates (B. 3.) Vin. Abr. Estate, (R.) Bac. Abr. Estate in Tail (B.); and see supra, pages 38 and 42, notes (q) and (r), on estates tail *ex provisione viri* and *ex provisione corona*. It may be proper to observe, that in marriage articles and wills directing settlements, words which in a final legal instrument would have created an estate tail, will, in order to effect the intention of the parties, be construed to give a mere life estate; and in the settlement made in pursuance of such articles or will, a mere life estate must be limited. But on these subjects see Treatise on Settlements, pages 92, 125, and 462.

(a) That is, if the grantor has an estate which enables him to make such a grant. Co. Lit. 42. But if tenant in tail or tenant for his own life makes such a grant generally, with livery, the grantee shall have the land but during the life of the grantor, for that is the greatest estate he can lawfully make; but if the king grants lands, or rent, and limits no estate, the grantee does not take any estate of freehold. Roll. Abr. Estate (O).

(b) Query of this, in case the instrument could operate in any other way—as the grant of a reversion expectant upon a life estate or term of years; as a bargain and sale if enrolled and there was a pecuniary consideration or money's worth; or as a covenant to stand seised if there was the consideration of blood.

(c) It is conceived, that if a case so circumstanced should now arise the word “or” would be construed conjunctively, and the party would take an estate in fee. See supra, page 86, note (d).

(d) See supra, page 101, note (x).

Co. 1. 66.

If lands be granted to *I. S.* for life, and after to the next heir male of *I. S.* and the heirs males of the body of such next heir male; by this *I. S.* hath but an estate for life. But if it be to the next heirs males of *I. S.* it is an entail (*e*).

20 H. 6. 33.

If one grant land to *I. S.* to have and to hold to him in fee simple, or in fee tail, without saying [to him and his heirs, or to him and his heirs males, or the like] this is but an estate for life, and no more. So if one grant land to *I. S.* to have and to hold to him and his seed, or to him and his issues generally, without more words; by this is made only an estate for life. But in the construction of a will the law is otherwise, in most of these cases.

Co. super Lit.
8. 20.

Will.

20 H. 8. 35.

If lands be granted to two *et heredibus* without this word [*suis*] by this they have an estate for their lives and no longer (*f*).

Co. 5. 112. 1.
149.

If one grant lands to *I. S.* to have and to hold to him and his heirs for his own life, or for the life of *I. D.*; by this *I. S.* hath an estate for life and no more.

Co. 4. 29.

super Lit. 1. 8.

If one grant lands to *A.* and *B.* *habendum vbi et suis* omitting all other words; or to have and to hold to them and their assigns; by this they have an estate for life only. So if lands be granted to any natural person, to have and to hold to him and his successors; by this he hath only an estate for his life.

Co. 8. 96.

If one grant his lands to *I. S.* to pay his debts, to have and to hold to him generally, without limiting any estate; in this case *I. S.* hath an estate for life only (*g*).

Dier 186.

If lands be granted to *A.* and *B.* to have and to hold to them for their lives, to the use of *C.* for his life; by this *C.* hath an estate for his life; by this *C.* hath an estate for his life if *A.* and *B.* live so long.

Lit. sect. 613.

Co. 1. 53.

super Lit. 345.

Plow. 562. 162.

Co. super Lit.

24.

If a tenant in tail grant *totum statum suum*; by this the grantee hath an estate for the life of the grantor, and no longer (*h*). And if a lessee for life grant all his estate; hereby his estate for life doth pass; for this as much as he can lawfully grant.

If a man have a son and a daughter, and die, and lands be granted to the daughter and the heirs females of the body of the father; it seems by this she hath only an estate for life.

Co. super Lit.

42. 234, 235.

If one grant land to another, to have and to hold to her while she shall live sole, or during her widowhood, or so long as she shall behave herself well, or so long as she shall dwell in such a house, or so long as she shall pay £10 yearly, or so long as the coverture between her

* P. 107.

(*e*) See *Wearne's Contingent Remainders*, 6th edit. 150, *et infra*, for cases similar to the above.

(*f*) But see *supra*, page 101, note (*y*).

(*g*) But in the case of a *devise* of lands to trustees or executors (without saying for what estate) for payment of debts and until they are paid, in a case like this the trustees or executors would take but a chattel interest in the lands. Co. Lit. 42 a.

(*h*) If tenant in tail conveys the estate to one and his heirs, the conveyance (where not made by fine or recovery) will pass a fee determinable on failure of the estate tail, and defeasible by the issue in tail. See *Mackel and Clarke*, 2 Ld. Raym. 778. *Seymour's case*, 10 Rep. 95; and see *supra*, page 33, note (*g*).

and her husband shall continue; or if one grant lands to a man, to have and to hold unto him until he shall be promoted to a benefice, or the like: in all these cases, if livery of seisin be made according to the deed, or if the grant be of such a thing whereof no livery is requisite, the grantee hath an estate for his life, and no more, and that determinable also.

If one grant lands to *I. S.* to have and to hold to him for life, and doth not say for whose life; this regularly shall be taken for the life of *I. S.* the lessee, and not for the life of the lessor. But if the lessor himself have but an estate for life in the lands granted, then the lease shall be construed to be, and to endure during that life only, by which the lessor did hold, to prevent a forfeiture. And if he that doth make the lease, be tenant in tail of the land, this shall be taken to be a lease for the life of the lessor. And if a tenant for life of land, make a lease for years of it, and then grant his reversion by the name of a reversion, to another, to have and to hold to him and his heirs; by this he hath only an estate for the life of the grantor, and no more. So if tenant in tail of land, grant it to one for years, and after grant his reversion to another, to have and to hold to him, and his heirs; this shall be construed to be an estate for the life of the tenant in tail, and no longer, and the attornment of the tenants in these cases will not alter the cases. And so it is in case of a release also; as if tenant in tail doth release to *B.* (being lessee for years of the land) all his right to the land, this shall be taken to enure but for the life of the tenant in tail and no longer (i): as if a man retain a servant, and say not how long; this shall be taken for a year (k), *Constructio legis non facit injuriam*.

Co. super Lit.
183. 42. Plow.
161. F. N. B.
168.

If one grant to *I. S.* that if he be not paid yearly for his life 40s. he shall distrain in the land of the grantor for it; by this *I. S.* hath an estate for life in the rent. And if a man by his deed grant a rent of £10 issuing out of all his land, quarterly, at the usual feasts, this is an estate for life of the grantee.

Co. super Lit.
147. Co. 8. 85.

If one grant lands to *I. S.* and *I. D.* to have and to hold to them during their lives, omitting these words [and the longest liver of them] by this notwithstanding they shall hold it during the life of the longest liver of them. And if lands be granted to *A.* to have and to hold to him during the lives of *B. C.* and *D.* without any more words; by this *A.* hath an estate during all their lives, and during the life of the longest liver of them. †(l) And if lands be granted to *A.* to have and to hold to him during his life, and during the lives of *B.* and *C.* by this he hath a lease for his own life, and the lives of *B.* and *C.* and the longest liver of them. But if a lease be made to *I. S.* of land, to have and

Co. 5. 9. 11. 3.

† 36 Eliz. B. R.
in the case of
Ross & Ad-
wick.

(i) But see last note.

(k) For that retainer is according to law. See 13th edition, Co. Lit. 42 b.

(l) But if a lease for years is granted to *A.* if *B.* and *C.* shall so long live, the lease will determine when either of them dies; therefore if the intention is, that the lease shall continue till both of them are dead, (provided the term continues so long), in that case the language of the lease should be, "if *B.* and *C.* or either of them should so long live."

* Adjudged.
B. R. s Ellis.
Hobart &
Wilmore's
case.
Co. super Lit.
41. 239. 388.
Flow. 356.
28. Dier 378.
321. 264. Co.
10. 98.

to hold to him during the time *that *A. and B. shall be justices of peace, or during the time that A. and B. shall be of the Inner Temple, or the like; in these cases the failer of one doth determine the estate.* * And if a lease be made to *B. only, to have and to hold to him and C. for their lives; by this B. hath an estate for his own life only, and no more, and C. hath nothing at all (x).* And here by the way let it be observed, in these and such like cases, where lands are granted to one man, to have and to hold to him [or to him and his assigns, or to him, his executors, administrators and assigns,] during the life, or during the lives of others; and in most cases where a man is tenant *pur auter vie*, i. e. for the life, or lives, of another, or others, if the tenant *pur auter vie* in possession die, his estate shall not go to his heirs, executors or administrators (x), unless they can first get into possession after his death, but he that can first get into the possession of the land after the death of the tenant *pur auter vie*, shall have it for his life, and after his death, then he that can first get into the possession again, &c. And therefore if the land were let by the tenant *pur auter vie* at the time of his death to any under-tenant for years, or for one year, or at will, and this under-tenant be in possession at the time of the death of the tenant *pur auter vie*, this under-tenant shall have it for his life, if the life or lives by which it is held so long live, for the rule in this case is *occupanti conceditur. Et capiat qui capere potest.* And this estate is called an occupancy, and he that hath it an occupant. To prevent which mischief, the lessee must take care when he takes his lease, to have it made to him and his heirs during the life or lives of him or them by whom it is held, for in this case after his death his heir and none other shall have it; or if this be neglected, then he must take care to grant over his estate by act executed (for by his last will he may not devise it) to some friend and his heirs in trust for him; or he may grant it over to another, and take a re-grant of it to himself and his heirs; or he may make a lease for years of the lands to some friends in trust, and by this means he may have the fruit of it during the term (o).

When

(m) See further, as to what words make an estate for life, in Vin. Abr. Estate, (N. a.) Bac. Abr. Estate for Life (A.)

(n) Query whether the executors or administrators where an estate *pur auter vie* is limited to a man his executors and administrators may not take as special occupants; as being persons specially designated to take in case the grantee dies during the lives of the *cestui que vie*?—In limitations to trustees to preserve contingent remainders and also in limitations to trustees to bar dower, it is very usual, it is believed, to limit the estate to the trustees their executors and administrators (and not to them and their heirs) during the life of the tenant for life or purchaser; and an estate *pur auter vie* not being an estate of inheritance, it is conceived such a mode of limitation is good.

(o) Where an estate *pur auter vie*, is not limited to the lessee and his heirs, the statute 29 Car. 2. c. 3. (which authorizes tenant *pur auter vie* to devise his estate by will attested by three witnesses, and if he does not devise it, charges it in the hands of the heir if it shall come to him by reason of a special occupancy as assets by descent), directs, that in case there is no special occupant thereof, it shall go to the grantee's executors or administrators and shall be assets in their hands. See 2 Salk. 464. 2 Vern. 719. And by the statute 14 Geo. 2. c. 20. after reciting the statute 29 Car. 2. c. 3. and that doubts had arisen where no devise had been made of estates *pur auter vie*, to whom the surplus of such estates, after the debts of the deceased owners thereof are satisfied, shall belong; it is enacted, "That such estates *pur auter vie*, in case there be no special occupant thereof, of which no devise shall have been made according to the said act, for prevention of frauds and perjuries, or so much thereof as shall not have been so devised, shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate." These two statutes have abolished the title of general or common occupancy; but special occupancy by the heir at law, where

For years.
When such a
lease shall be-
gin, and how
long it shall
continue.

When no time is set down for the beginning of an estate, then it shall begin presently; otherwise it shall begin at the time expressed, if it may stand with law. If a lease for years be made, bearing date the 28th day of *May*, to have and to hold for twenty-one years from the date, or from the day of the date; in these cases the lease shall begin on the 27th day of *May* (p). But if the words be, to have and to hold from henceforth, or from the making hereof, in these cases the lease shall begin on the day in which it is delivered. And if it be to begin *à die confectionis*, then it shall begin the next day after the delivery. And if it be, to have and to hold for twenty-one years, without mentioning when it shall begin, it shall begin from the delivery, if there be no former lease in being; and if there be, then it shall begin from the time of the ending of that lease (q). If the deed have a date which is void, or impossible, as the 30th of *February*, or 4th of *March*, and the term be limited to begin from the date, then it shall begin from the delivery. So if a man by his deed recite a lease which is not, or which is void, or misrecite a lease that is in esse in point material (r), and then say, to have and to hold from the end of the former lease; this lease shall begin in course of time at the time of the delivery of the deed.

Co. super Lit.
46. Co. 51. 2.
5. Dier 286.
307.

* P. 109.

If one make a lease of land to *A.* for twenty years, and then grant it to *B.* to have and to hold to him from the end of the first term, &c. in this case this second lease shall begin, as soon as the first lease, by what means soever, shall end. But if the words of the second lease be, to have and to hold to him from the end of the twenty years, in this case the second lease shall not begin until the twenty years be expired. And if one make a lease of white acre to *A.* for ten years, and of black acre to *B.* for twenty years, and then, reciting both the leases, doth make a lease to *C.* to begin after the former leases; this shall be taken respectively, and shall begin; for white acre after the end of the ten years, and for black acre after the end of twenty years. And if one makes a lease to two for sixty years, provided that if the lessees shall die within the term, that then presently after the decease of the last of them longest living, the lessor shall re-enter, and one of

Co. 1. 154.
Plow. 192.

Co. 6. 36.

where the original grant is to a man and his heirs during the life of *cestui que vie*, still continues. See further, as to the general doctrine of occupancy, and of what things it may be, 2 Bla. Com. 8. 256. and 400. The notes to the 13th edition, Co. Lit. 41 b. Com. Dig. Estates (F.) 2 Ld. Raym. 1000. 6 Mod. 66. Bac. Abr. Estate for Life, (B.) 1b. Heir and Ancestor, (I.) Vin. Abr. Occupant.—and Estate (R. & S.) Eq. Ca. Abr. Estate, (B.) 1 Atk. 524. 3 Atk. 708. In an estate *pur autre vie*, what is termed a *quasi entail* may be created. How such entail may be barred, see *supra*, p. 50, note (g).

(p) In the case of *Pugh v. Duke of Leeds*, Cowp. Rep. 714 a. Lease for twenty-one years, made to commence from the day of the date, was held to take effect in possession, and the same as if it had been to hold from the date. See *supra*, p. 72, note (q).

(q) The term, it is conceived, would commence from the execution, and would take effect in possession upon the expiration, surrender, forfeiture, or other determination of the former lease.

(r) A misrecital in the date of a lease may sometimes affect the validity of the title to the property comprised in the lease. As if a lease is recited in an assignment to bear date on a certain day (mentioning it), when, in point of fact, it was dated on some other day, and the assignment then assigns the property demised by the said recited indenture of lease, but there being no such indenture, the assignment would not be good, unless it could be supported from certainty in the description of the property, or in some other way. In recitals therefore of deeds attention should be paid to their dates; or the best way perhaps is to recite them as bearing date on or about such a day.

them

them die; and after the lessor doth make a lease to another, *habendum, &c. cum post sive per mortem sursum reddi vel forisfacturam* of the last surviving lessee *acciderit vacare* for forty years; in this case, this second lease shall begin after the death of the lessee surviving, re-entry of the lessor, or the effluxion of time of the first lease, which of them shall first happen, and the lessee cannot at his election make it to begin at any other time.

Dier 261.

If a man make a lease for thirty years, and four years after make another lease to another man, in these words. *Noveritis, &c. me A. de B. predictis 30. Annis finitis dedisse et concessisse B. de C. &c. Habendum à die consecrationis presentium et termino predicto finito, usque ad finem 31 Annorum*: by this the second term shall begin at the end of the thirty years. And if one make a lease to A. for twenty years, and after make a lease to B. to have and to hold to him, from the end of the first term, for twenty years, to be accounted from the date of the last deed: in this case the second lease shall begin at the end of the first lease, and these words [to be accounted, &c.] shall be rejected.

Craddock's case, Pasc. 7 Jac. Co. B.

Dier 112.

If one make a lease of land to A. for ten years, and after by indenture grant it to B. to have and to hold to him, from *Michaelmas* next for ten years, and after the first lessee doth purchase the reversion, by which his term is drowned; in this case, the second lease shall begin presently when *Michaelmas* is come.

Mich. 13 Jac. B. R.

If two joint-tenants be, and one of them grant the land to I. S. to have and to hold to him for twenty years, if the lessor and his companion so long live; by this the lease shall continue no longer than they both live together, and when either of them is dead the lease is determined.

P. 110.

* Co. 5. 9.

* And if one grant his land to I. S. to have and to hold to him, his executors, &c. for the term of one hundred years, if A. B. and C. live so long, and leave out these words [or either of them] in this case, if either of them die, the lease is determined. But if the words be, to have and to hold for one hundred years if A. B. or C. [omitting or either of them] shall live so long, *contra*. ^b If a lease be made of land to the husband and wife, to have and to hold to them for twenty-one years, if the husband and wife, or any child between them, shall so long live; this is a good lease, and shall continue for all their lives, and for the life of the longest liver of them, albeit the first words be in the copulative.

^b Pasch. 30 Eliz. C. B.

Dier 307. 69. Plow. 520. 344. 525. 423. 424. Co. 7. 23.

If one possessed of land for a term of years, grant the same to another, to have and to hold to him, his executors and administrators, or to him and his assigns, or to him, without any more words; or if a man that is possessed of a term grant his lease to another, and doth not say for what time; it seems in these cases, the whole term is granted, albeit no livery of seisin be made. And in the first case if livery of seisin be made, then it seems there doth pass an estate for the life of the grantee, and therefore that this is a forfeiture of the estate of the lessee for years, whereof he in the reversion may take advantage presently. And if a lessee for years of land grant a rent out

out of the land generally, without any limitations, this shall be construed to enure for a grant of the rent so long as the estate of the grantor doth continue. But if he grant a rent by express words, for the life of the grantee: by this the grantee shall have it for all the term if he live so long.

If one grant lands to *I. S.* to have and to hold to him for life, reserving the first seven years a rose, and if he will hold the land over, that he shall pay a rent in money, and no livery of seisin is made; by this it seems in certain is made a lease for seven years, until the condition be performed; and then also it seems it is a lease for no longer time. And so perhaps it will be, if livery of seisin be made.

Co. super
Lit. 218.

If one grant a rent of £5 *per annum* unto *I. S.* to have and to hold to him, &c. until he shall receive £20, in this case he shall have a lease for four years of this rent. But if lands be granted to *I. S.* to have and to hold, &c. until he shall receive £20 out of the profits of it; in this case if livery of seisin be made, the grantee hath an estate determinable upon the levying of the money; and if no livery be made, he hath no estate at all but at will.

Co. super
Lit. 42.
Plow. 273.

* P. 111.

If one make a lease for life, and say that if the lessee within one * year pay not 20s. that he shall have but a term for two years; by this if he doth not pay the money he hath only a lease for two years, albeit livery of seisin be made upon it.

Co. super
Lit. 218.

If one make a lease to *I. S.* to have and to hold to him, his executors, &c. for ten years if *I. D.* shall live so long, and *I. D.* is dead at the time when the lease is made; in this case *I. S.* hath an absolute lease for ten years.

Co. 9. 63. 66.

If one grant lands to *I. S.* to have and to hold to him, his executors, &c. for three years, and so from three years to three years during the life of *I. S.* or from three years to three years during the life of the lessee; by this it seems *I. S.* hath a lease for six years and no more. And if one grant lands to *I. S.* to hold for three years, and after the end of those three years for three other years, and after the end of those three years for three other years, during the life of the lessor; by this it seems *I. S.* hath a lease for nine years and no more. And yet if in these and such like cases, where a lease is made from so many years to so many, for the life of any person, livery of seisin be made upon this deed, *secundum formam chartæ*; this perhaps may be an estate for life.

Plow. 273.
Co. super
Lit. 45.
Dier 24.

If lands be granted, to have and to hold from Lady-day, *pro termino unius Anni & sic de uno Anno in unum Annum quamdiu ambabus partibus placuerit*; by this the grantee hath a lease for three years only in certain, and afterwards a lease at will. And if lands be granted to have and to hold from the Nativity of Christ next, *pro termino unius Anni, & si in fine dict' unius Anni ambæ partes placerent quod eadem presens dimissio foret renovata tunc habend' premissa* to the lessee, &c. *ab & post dictum festum Nativitatis Domini usque terminum trium Annorum estunc prox' sequen'*; by this the grantee hath a lease in certain

14 H. 8. 10.
Co. 6. 35. 2
106.

certain but for one year only, and if the parties agree again, a lease for three years.

Co. 6. 35.
21 H. 7. 38.

If one make a lease to *I. S.* to have and to hold to him for years, and say not how many years: by this the lessee hath a lease for two years and no more.

Co. 3. 19.

If one grant his land to *I. S.* to have and to hold to him until *I. D.* shall come to twenty-one years of age; in this case if *I. D.* die before that time the lease is ended.

Co. 1. 44.
7 H. 4. 42.

If a man possessed of a term of years of land doth grant the land to another and his heirs, this by construction will amount to a good grant of his interest (s).

Dier 263.

If lands be granted to husband and wife, and to *I. S.* to have and to hold to them, and to the heirs of the husband and *I. S.*; by this the wife hath only an estate for life, in a moiety with her husband, and the husband and *I. S.* have the fee-simple in joint-tenancy, to them and their heirs (t).

Co. 3. 87. 10.
50. super
Lit. 25.
Dier 145.

If lands be granted to two brothers, or two sisters, or to a brother and sister, or to a father and son, or any others, to have and to hold to them, and the heirs of their bodies begotten: by this they have joint estates for their lives, so that the survivor of them will have the whole for his life, and several inheritances, i. e. estates in general tail by moieties in common one with another (u). And if land be granted to two men and their wives, and the heirs of their bodies begotten; in this case they have joint estates for life, and afterwards the one husband and wife shall have the one moiety, and the other husband and wife the other moiety, in common (x). And if lands be granted to a man and two women, to have and to hold to

Limitation of
estates to di-
vers persons.

* P. 112.

(s) This is by reason of husband and wife being considered in law but as one person. But if the grant had been made before the marriage, and consequently before this legal unity of person had taken place, the husband and wife and *I. S.* would have been joint-tenants for life; and the husband and wife during the life of *I. S.* would have been entitled to two thirds.

(t) If a joint estate in lands is made to husband and wife and a third person and their heirs, the husband and wife are entitled to one moiety, and the third person to the other moiety, and if the husband and wife or either of them survive such third person and the joint-tenancy has not been severed, the entirety will vest in the husband and wife, if both are living, or in the survivor of them if either of them is dead. And if such third person survives both the husband and wife and the joint-tenancy has not been severed, the whole will vest in such third person by survivorship. In a case like the above, where an estate is limited to husband and wife, they are said to be tenants by entirety; and where they are so (unless the estate was so limited by a voluntary settlement made by the husband himself) the husband alone cannot alien, charge, or forfeit the estate, so as to affect his wife's interest; but in case she survives the entire interest which was vested in them both will survive to her notwithstanding any alienation or charge by the husband. See 1 Inst. 187 b. ib. 326 a. *Wimbish and Talbot's case*, Plowd. Com. 58 b. *Doe v. Parratt*, 5 Term Rep. 652. *Green v. King*, 2 Black. Rep. 1211. *Beaumont's case*, 9 Rep. 138. But it would appear (notwithstanding the act against discontinuances; 32 Hen. 8. c. 28.) that where husband and wife are seised in tail by entirety and the husband alone levies a fine with proclamations, and the wife survives and suffers five years to elapse without re-continuing the estate that she is barred of her right. *Greenley's case*, 8 Rep. 72. And the issue in tail are held to be also barred by a fine with proclamation levied by the husband alone. *Greenley's case*, ubi sup. sed query, and see supra, page 24, note (f). But a recovery by the husband alone, where he and his wife are seised in tail by entirety, will not bar either the wife or the heirs in tail. *Owen v. Murgan*, 5 Rep. 5 a. Where the husband and wife are tenants by entirety of a term of years (*Grutt v. Lowcroft*, Cro. Eliz. 287.) or other mere chattel interest, there it is understood that the husband alone may assign the property and deprive his wife of the benefit of survivorship, unless the property was settled as provision for the wife in case she survived and such settlement was made in consideration of marriage, or for some other valuable consideration. Where a grant is made to the use of a man and woman before marriage but the use does not arise till after the marriage, there they will not be tenants by entirety. 1 Inst. 187 b.

(u) And if a gift be made to two men and the heirs of their two bodies, the remainder to them two and their heirs; they are joint-tenants for life, tenants in common of the estate tail, and joint-tenants of the fee. Co. Lit. 183 b.

(x) And no cross remainder or other possibility shall be allowed between them. Co. Lit. 25 b.

them

them, and the heirs of their bodies; by this they have each of them an estate tail in common with the other (y).

If lands be granted to husband and wife, to have and to hold to them, and their heirs of their bodies issuing, or in any such like manner; by this the wife hath an estate tail, as far forth as the husband. But if it be granted to them, to have and to hold to them, and the heirs of the body of the husband, or to the husband and wife, and the heirs of the husband which he shall have by his wife, or in any such like manner; by this the wife hath only an estate for life, and the whole estate tail is in the husband. So *vice versé* if lands be granted to husband and wife, and the heirs of the wife upon her body begotten by the husband; by this he hath an estate for his life only, and his wife the whole estate tail. And if lands be granted to the husband, to have and to hold to him and the heirs of his body, on the body of his wife begotten; or to have and to hold to him, and the heirs of his body begotten on the wife he shall first marry; or to have and to hold to him, and his wife he shall first marry; and the heirs of their bodies begotten; in these cases the husbands have the whole estate, and the wives nothing at all. But otherwise it is it seems when the estate is limited by way of use to a man and his wife, that he shall afterwards marry, for by this it seems the wife shall take also.

Use.

If lands be granted to A. a married man, and to S. a married wife, and to the heirs of their bodies engendered; by this they have each of them an estate tail presently executed, and while the wife of the husband, and the husband of the wife live, they shall hold it for their lives, and if they happen to die, and these to intermarry and have issues, their issues shall have it according to the intail (z).

Lit. sect. 27,
28, 29. Co.
super Lit. 26.
Dier 340.
Co. 1. xoo.

(y) So if lands are given to two men and one woman, and the heirs of their three bodies begotten, they have several inheritances. Co. Lit. 184 a.

(z) Where lands are limited to a man and his wife for their lives and the life of the survivor, with remainder to the heirs of their bodies; this gives them a joint estate-tail executed. *Roe v. Astrop*, 2 Black. Rep. 1228. And where an estate is given to husband and wife for their lives, remainder to their first and other sons in tail, with remainder to the heirs male of the bodies of the husband and wife, in a case like this the husband and wife are said to take an estate tail executed *sub modo*; that is, executed so as not to merge their life estates absolutely but executed only till the birth of a son, and that upon the birth of such son the husband and wife become mere tenants for life, with remainder to their first and other sons in tail, with remainder to the husband and wife in tail. *Bowler's case*, 11 Rep. 80. If lands are limited to husband and wife successively for life (and not to them jointly for their lives) with remainder to the heirs of their bodies; the husband and wife do not take an estate tail executed in possession but a joint remainder in tail. *Stevens v. Bretridge*, Raym. 36. In the case of an estate limited to the husband and wife and the heirs of the body of the husband, the estate tail is solely in the husband. *Owen's case*, 3 Rep. 5. *Ring v. Edwards*, Cro. Car. 320. Where the limitation is to the husband for life, with remainder to the heirs of the body of both the husband and wife, in such a case as this there is no estate-tail in either the husband or wife but a contingent remainder to such person as shall be the heir of the body of both of them; and therefore if the husband should die first such remainder would become void for want of an estate of freehold to support it; for the remainder in such a case continues in contingency till the death of both the husband and wife; for till the death of the survivor it cannot be ascertained who will answer the description of heir of both their bodies. See 1 Leon. 102. 2 Dyer, 64, and 99. and also see *Frogmorton v. Wherry*, 3 Wils. 125, and 244, and *Lane v. Pennell*, 1 Rol. Rep. 238, and 438. In a case (*Roe v. Quartley*, 1 Durnf. & East. T. R. 630.) where there was a devise to the right heirs of husband and wife (but without giving an estate to the husband and wife themselves or to either of them,) it was held that it was a devise to such person as answered the description of heir to both of them; the court observing that the devise was to be construed in the same way as it has been to the heirs of the body of both the husband and wife. An only daughter therefore of the husband and wife was held to be entitled to the exclusion of a daughter of the husband's by a second wife. [For information on cases similar to the above, see *supra*, page 105, and note (x).]

Dier 126. 56.

If lands be granted to *A.* and *B.* to have and to hold to *A.* for life, the remainder to *B.* in fee: by this *A.* shall have the whole for his life, and *B.* the fee-simple afterwards (*x*).

Co. 2. 23. 8.
56. Perk.
sect. 181.
14 H. 8. 14.
Co. super
Lit. 183.

As touching this matter, these differences are to be taken; between things that are granted, and between the estates: when the things that are granted are such as lie in grant, and take effect by the delivery of the deed only, without any ceremony, or take effect by the same ceremony; and when not, but another ceremony is required to the perfection of the grant and estate, and when there is an express estate made by the deed in the premises thereof; and when but an implied estate only: as for examples, if one grant land, rent, common, or any such like thing, to one and his heirs, by the premises of the deed to have and to hold to him for life, or to have and to hold to him and to his assigns, without more words; in this case the *habendum* is repugnant and void, and by this the grantee shall have an estate in fee simple, if livery of seisin and attornment as the case doth require be duly made, for otherwise no estate at all, but at will, will pass (*y*). So if a man grant a rent, or any such like thing that lieth in grant, to one and his heirs, to have and to hold to him for years; this is a void *habendum*, and the grantee shall have the fee-simple. But if a man grant land to another and his heirs, to have and to hold to him for a certain number of years; in this case, whether he make livery of seisin or not, it is a good *habendum*; and by this the grantee shall have an estate for so many years, and no more (*z*). So if one grant land, rent, common, or any such like thing, to one in the premises of the deed, without limitation of estate, (which in judgment of law is an implied estate for life) to have and to hold to him for a certain number of years, or at will; this *habendum* is good, and shall stand with the premises, and qualify it; and by this the grantee shall have but a lease for years, or at will, as the *habendum* is. And if one grant land by the premises of a deed to one and his heirs of his body, to have and to hold to him and his heirs; this *habendum* shall stand, and this shall be taken an estate tail, and a fee-simple expectant. So *vice versâ*, if land be granted to one and his heirs, to have and to hold to him, and his heirs of his body; this shall be construed an estate tail, and a fee-simple expectant, and so both shall stand together (*a*).

If lands be given to *B.* and his heirs, to have and to hold to *B.* and his heirs, and if he die without heirs of his body, that it shall revert to the donor, it seems this is a

When the *habendum* shall be said to be repugnant and void; and when not, but shall control, divide, or expound the premises.

* P. 113.

Co. 2. 154.
1 H. 6. 7. Co.
super Lit. 20.
Dier 126. &c.
per curiam in
Herman's
case, Pasch.
1 Jac. B. R.
1 H. 6. 7. Co.
super Lit. 21.

See further in Bac. Abr. Joint-tenants (D.) Com. Dig. Estates (K. 1.) Vin. Abr. Joint-tenants

If a grant is made to a man and his heirs, *habendum* to him and his heirs to the use of him and his heirs for the lives of others, this use is a limitation at the common law and the grantee merely has an estate for the lives of the *cestuis que vie*; but if remainders over had been limited after the use for lives, in that case the grantee would have had a seisin in fee in order to supply the uses of the remainder, and instead of taking the estate which was limited to himself for the lives of others, as at the common law he would take it under the statute of Uses.

Quere of the above, and see supra, page 75, note (a).

See supra, page 75, note (a).

fee tail only, and no fee simple expectant. *Voluntas donatoris in charta doni sui manifestè expressa observanda est.*

If a lease for years be made of land, and then the lessor by the premises of the deed, granteth the land to another, to have and to hold the reversion of the land to him, &c. for life; this *habendum* shall stand. So if by the premises of the deed, the reversion be granted, to have and to hold the land itself, this is good and both shall stand together; but nothing is granted in either case but the reversion. Co. 10. 107. 108.

* P. 114.

If the next advowson of a church be granted to three, to have and to hold to them, and either of them, jointly and severally; this is joint and the *habendum* is void. † And yet if one grant land to two by * the premises of the deed, To have and to hold to one of them for life, the remainder to the other for life; this is not repugnant, but shall stand together, and make the estates several, and in remainder one after another. So if a lease be made to two, to have and to hold the one moiety to the one, and the other moiety to the other; by this they have several estates. † Co. 2. 55. super Lit. 183. Dier 304. Co. 5. 19. Dier 106.

Expressum facit semper cessare tacitum.

If a man have a lease for years of land, and he reciting this, by the premises of the deed doth grant all his estate in the land, to have and to hold the land or the term after his death, or for part of the time only; in this case the *habendum* is void, and the whole estate doth pass immediately by the premises (b). Dier 272. Plow. 520.

If a tenant for life surrender a moiety of his land, and the lessor grant it all to a stranger, to have and to hold the one moiety for life, and the other moiety for forty years after the death of the tenant for life; this *habendum* shall stand and enure according to the grant. Dier 256.

If a man seised of land in fee make a lease for life of it to one, and after grant the reversion of it to another, to have and to hold the reversion and the tenements aforesaid *cum post mortem, forisfact, &c. vacare acciderit*; in this case, the *habendum* and premises may stand together (c). It is usual in the *habendum* of a deed to set down to what use the party, to whom the deed is made, shall have the thing granted. But touching this, and the matters that do concern uses, see *Use, infra*, at large. And see also more for the *exposition of deeds in Testaments, numb. 8. Grant, numb. 4. Leases, cap. 14. numb. 4.* And here note, that parol agreements and conveyances have the same construction for the most part made upon them, as are made before upon deeds. And therefore if a man by word of mouth, without any writing, grant all his land in *Dale to I. S.* to have and to hold to him for life, but doth not say for whose life; this shall have the same construction as such a grant made in writing hath (d). Curia Pasch. 7 Jac. Co. 8.

Note.

(b) Whether the *habendum* would be bad or not, depends, it is conceived, upon the question, whether a person who has a term of years can make a grant or assignment of the term to commence *in futuro*. From the case of *Jermyn v. Orchard*, (Show. Parl. Ca. 1. 26) it would appear he cannot see Plow. Com. 524. which seems to countenance a contrary opinion.

(c) On the subject of repugnancy between the premises and the *habendum*, see *supra*, page note (a).

(d) Before the act of the 29 Car. 2. c. 2. (called the statute of Frauds) the grant would have been the life of the grantee or grantor, according to the estate which the grantor had in the premises. See *supra*, page 105, note (a). But since this act no estate or interest in lands can be created parol, except leases not exceeding three years.

Co. 5. 111. 10.
106. 8. 71. Co.
super Lit. 47.
213. 214.

This is always taken most in advantage of the feoffee, grantee, lessee, &c. and against the feoffor, grantor, lessor, &c. and yet so as the rent be paid during the time. And therefore if the reservation be only to the feoffor, grantor, &c. and the deed do not say also [to his heirs, executors, &c.] this reservation shall continue only for the life-time of the grantor and shall determine with his death. And so also it is where the reservation is to the feoffor, or his heirs, in the disjunctive; for in this case the rent shall continue only during the life of the grantor (e). And yet if one make a lease for years rendering rent yearly during the said term, to the lessor, or his heirs, or executors; this is a good reservation during all the term, by reason of these words [during the term] (f). So if the feoffor or lessor be * seised in fee, and make a feoffment in fee, or lease for life or years, rendering rent to the feoffor, or lessor, or his executors or assigns; in this case the rent shall continue only for the life of the lessor. But if the reservation be to the feoffor, or lessor, his heirs and assigns, in the copulative, or in the disjunctive to him, or his heirs, or to him and his successors (if it be the lease of a corporation) during the term; then all the assignees of the reversion shall enjoy it. And if the reservation be thus, yielding and paying so much rent (without any more words,) this shall be taken for all the time of the estate, and shall go to him in reversion accordingly. And if the reservation be, rendering so much rent during the said term, and doth not say to whom; in this case it shall be construed to be to him that hath the reversion, and accordingly it shall be paid and shall continue during the term (g). * But if A. be seised of land in fee, and make a lease for years of it, rendering rent to A. [without saying to his heirs, &c.] during the said term; this rent shall continue only during the life of A. and no longer. And yet if A. be possessed of a term only, and make an under lease or assignment with such a reservation, *Quere*.

In the reservation of rent: and how that shall be taken.

* P. 115.

Plow. 171.
21 H. 7. 25.
27 H. 8. 19.
Dier 45.

* So held in the case of Bland, M. 8 Car. B. R.

27 H. 8. 19.

* Pas. 21 Jac. Hudson & Brent, B. R. Co. 10. 107.

If the reservation be thus, yielding and paying twenty shillings during the said term, omitting the word [yearly] this shall be taken, to be not once only, but yearly during the term, and accordingly it must be paid. * And if a lease be made for years, rendering in every middle of the year, *quolibet medio Anni* £20, this shall be paid during the term.

If one by deed indented grant lands to A. to have and to hold to him for life, the remainder to B. and the heirs of his body, and for default of such issue, to remain to D. in tail, or for life, yielding therefore yearly, &c. in this case the reservation shall extend to all the estates.

(e) The word "or," it is conceived, would be considered as a mistake, and would be construed conjunctively, (see *supra*, page 85, note (d).) and the reservation would be good during the term.

(f) If the rent is made payable yearly, without saying *during the term*, the payment must nevertheless be made during the term. Moor, 459.

(g) To reserve the rent generally, without saying to whom, is in most cases, especially in leases under powers, the best way; and the rent will belong to the person who for the time being, is entitled to the reversion expectant upon the term: and see *supra*, page 79, note (q).

If a lease be made the 10th day of *August*, rendering rent at our Lady-day and Michaelmas; in this case albeit our Lady-day be first named, yet the first payment shall be at Michaelmas next after the making of the deed. Dier 130.
Co. 5. 111.
super Lit. 217.

If the reservation be at Michaelmas, or within twenty days after: in this case the 20th day shall be taken exclusive. But if the rent be to be paid at Michaelmas or by the space of twenty days after, in this case the 20th day shall be taken inclusive. Per Williams
& Yeiverton,
Just.—Ch.
Just. contra,
9 Jac. B. R.
Co. 10. 106.

If a lease be made in *December*, from the Nativity of Christ next for one year with this addition, *et si in fine dicti anni ambæ partes agrearent quod eadem dimissio foret renovata tunc habend' & tenend' premissa dicto I. S.* (the lessee) *ab & post dictum festum tunc proxim. sequend. usque finem trium annorum. reddendo inde annuatim durante dicto termino dict. W. S. &c.* in this case, the reservation shall relate to both the terms; and the rent shall be paid the first year, although they do not agree to renew the lease.

P. 116.

If two joint-tenants by deed poll, or by word (h), make a lease for life, reserving a rent to one of them; this shall go to them both (i). So if one of them be tenant for life, and the other in fee, and they join in a lease for life; or gift in tail reserving a rent; the rent shall enure to them both. But if tenant for life, and he in reversion, join in a lease for life, or gift in tail by deed reserving a rent, the rent shall enure to the tenant for life only, during his life, and after to him in reversion. Co. super
Lit. 214.

If two tenants in common make a lease of their land rendering twenty shillings rent; this shall be but one twenty shillings, and not two twenty shillings. So if the lease be rendering a hawk or a horse: by this they shall have but one hawk, or one horse, and not two hawks or two horses, as it shall be in cases where they do join in the grant of such things out of their land. Plow. 171.
289.
Co. 10. 106.

If one make a gift in tail of two acres of land, the one at the common law, and the other in borough English, rendering an ox to him and his heirs, and the donee having two sons die, and the eldest son doth inherit the one acre, and the youngest son doth inherit the other; in this case the donor and his heirs shall have but one ox, &c. Co. 10. 106.

If one make a lease of land for years if the lessee live so long, and after the lessor by his deed indented doth grant the land to another, to have and to hold the reversion to the grantee for his life *cum post mortem, &c. aut aliter acciderit vacare reddend' inde annuatim* to the grantor and his heirs *cum reversio predicta acciderit, 9s. 4d. per annum*; in this case this reservation of rent shall not begin before the reversion happen in possession. Co. 10. 137,
108.

If rent be reserved to be paid at two terms, and it is not 13 H. 4.
Avowry 240.

(h) See the statute of Frauds, (29 Car. 2. c. 2.) which prohibits the making of leases by parol for more than three years.

(i) In respect of the joint reversion: So a surrender to one of them shall enure to them both: Co. Lit. 214 a. But if the lease be by deed indented of them both, and the reservation to one of them only, it shall enure to him only to whom it is made. Lit. § 346. and see further for the reason of authorities on this point, Gilb. on Rents, 63. Bac. Abr. Rent (G.) Vin. Abr. tit. Reservation (E.)

Co. 8. 95. 10.
47. Bro.
Done 57. Fitz.
Done 2.

said by equal portions; yet it shall be so taken, and it must be so paid (k).

If one be possessed of a term of years of land, and grant it by deed to *I. S.* for his life, and after his death to *I. D.* in this case the whole term is granted to *I. S.* and his executors, administrators, and assigns shall have it and not *I. D.* (l). But if a term were so devised by will, *contra*. Devise. And if one give or grant to another his horse, or his books for his life, and that after his death they shall remain to another, the remainder is void, and the first shall have it for ever, for the gift or grant of such thing for an hour is the gift of it for ever (m).

See more in *Use*, number 7. (n).

And

(k) It is observed, in the preface to *Ld. Ch. Baron Gilbert's Treatise on Rents*, that there is no part of the law more extensively useful, and interesting, than that of rents, and yet perhaps no part in which those niceties and distinctions, that are essential both to rights, and the means of recovering them, are less understood. Those who wish to obtain a clear knowledge of the doctrine of rents, and the practice respecting them, will find very considerable assistance in that excellent book, and in another small *Treatise of the same author on distresses and replevin*. See also the statutes of 32 H. 8. c. 37. 2 W. & M. c. 5. 4 Ann. c. 16. § 10. 8 Ann. c. 14. 4 Geo. 2. c. 28. 11 Geo. 2. c. 19. 20 Geo. 2. c. 52. § 42. and see further *infra*, in the chapter on Leases.

(l) If an interest in a term of years *in esse* can be made to commence *in futuro* (see *supra*, page 78, note (1)) in that case it is conceived *J. S.* would only take the term for so many years as he lived, and then *J. D.* would take it in remainder. By assigning however the whole term to a trustee it is quite clear that the equitable or beneficial interest may be limited to one for life with remainders over. So in a will, it is well settled that a term of years may be devised to one for life with remainders over.

(m) Query of this, and see the last note; for if a particular interest with remainders over can be limited at law in a term of years, there can be no doubt, it is apprehended, but the same may be done in the case of any other chattel interest. However by way of trust, or by will it may clearly be done.

(n) It may not be improper to subjoin some account of the several acts of parliament for registering deeds and wills.

The first statute in order of time is that of 2 & 3 Ann. c. 4. "For the public registering of all deeds, conveyances, and wills, that shall be made of any honors, manors, lands, or hereditaments within the West riding of the county of York after the 29th of September, 1704." It enacts, that a memorial of all deeds, and conveyances which shall be made after the 29th of September, 1704, and of all wills and devises in writing, where the deviser or testator shall die after the said 29th of September, whereby any honors, manors, &c. in the said West riding may be any way affected in law or equity, may, at the election of the parties concerned, be registered in manner directed by that act, and that every deed or conveyance, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration, unless such memorial thereof shall be registered as by the act is directed, before the registering of the memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim; and that every devise by will of the honors, &c. contained in any memorial so registered, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered in such manner as by the act is directed. The act does not extend to any copyhold estates, nor to any leases at a rack rent, nor to any lease not exceeding twenty-one years, where the actual possession and occupation goes along with the lease. It directs that memorials of wills registered within six months after the death of every respective testator, dying within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, or within three years after the death of every respective testator dying in parts beyond the seas, shall be as valid against subsequent purchasers, as if the same had been registered immediately after the testator's death.

The statute of 5 Ann. c. 18. is for enrolment of bargains and sales within the West Riding of the county of York, in the register-office there, and for making the said register more effectual.

The statute of 6 Ann. c. 35. establishes a register for the East Riding of the county of York, and for the town and county of Kingston-upon-Hull, for all deeds and wills of lands therein, which shall be made and executed after the 29th of September, 1708, on the same plan, and under nearly the same regulations, as in the before-mentioned act; and this act directs, that all the clauses and provisions contained in it, which are not provided for or contained in the said acts of 2 and 3 Ann. c. 4. and 5 Ann. c. 18. shall extend to lands in the West Riding, as effectually as if they had been inserted in the said acts for establishing the register in the West Riding.

The statute, 7 Ann. c. 20. establishes in like manner a register for the county of Middlesex, after the 29th of September, 1709, with an exception not only of copyhold estates, leases at a rack rent, and leases not exceeding twenty-one years, as in the several acts before-mentioned, but with an additional exception of the chambers in Serjeant's-Inn, the Inns of Court, or Inns of Chancery.

And it is now time that we come to the other parts of a deed and first to a *condition*.

The statute of 8 Geo. 2. c. 6. establishes, in like manner, a register for the *North Riding* of the county of *York*, after the 29th day of *September*, 1736.

By these statutes there is not any time limited for registering *deeds*; [in the case of wills it is otherwise,] it is therefore obvious, from an inspection of the acts, how necessary it is *that deeds should be registered immediately on their being executed*; to enforce this the more strongly, it may not be useless to observe, that if a subsequent conveyance or mortgage should be executed for a valuable consideration, and from inattention or delay of the first purchaser or mortgagee in not immediately registering, the second purchaser or mortgagee should register first; in such a case the second purchaser or mortgagee would clearly acquire the legal estate, and if he had no notice of the first purchase or mortgage and there was no fraud, equity would not take from him the advantage which he had acquired at law by the prior registration of his conveyance or mortgage. The limits of a note not admitting of more than a brief notice of the above acts, Mr. Sugden's valuable work on Vendors and Purchasers is referred to for fuller information upon them; and see also Rigge on the Register Acts.

CHAP. VI.

OF A CONDITION.

Terms of the
law. Co. super
Lit. 201.

27 H. 8. 16.
Co. 270.

Co. super Lit.
201. Plow.
Colthirst's
case, Co. 8. 43.

A CONDITION is a kind of law, or bridle, annexed to one's act, staying or suspending the same, and making it uncertain whether it shall take effect or no; or, as others define it, it is *modus*, a quality annexed by him that hath estate, interest, or right, to the land, &c. whereby an estate, &c. may either be created, defeated, or enlarged upon an uncertain event. And this doth differ from a limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue (a). And this sometimes is contained in a testament or will, and sometimes in a deed. And when it is in a deed it hath no proper place assigned it, but it may be in any part of the deed; howbeit for the most part it is placed next after the *habendum*, or next after the reservation of the rent. It is also sometimes annexed to and depending upon estates; and sometimes annexed to and depending upon recognizances, statutes, obligations, contracts, and other things: conditions are also contained in acts of parliament and records. But of these we speak not here in the ensuing matters, which are especially to be applied to such conditions as are usually contained in deeds and annexed to the reality, i.e. to estates in fee-simple, fee-tail, for life, or years.

And of these conditions there are divers kinds. For some are in deed or express, i.e. when the condition is expressed by the party in legal terms, and by express words in writing, or without writing, knit to the estate; as if I enfeof a man of land, rendering rent at a day, on condition, that if it be not paid, it shall be lawful for me to re-enter. And some are in law or implied, i.e. when the condition is *tacite* created by the law, without any words used by the party (b). The first sort of conditions also are some of them precedent, or executed, i.e. when the condition must be fulfilled ere the estate can take effect; as where an agreement is between me and *I. S.* that if he

1. Condition.
Quid.

Limitation.
Quid.

2. Quotuplex;

(a) For the distinction between a condition, and a conditional limitation, see note at the end of the chapter, and also *Bac. Abr. Conditions* (H.) and further 1 *Atk.* 374, 383.

(b) Conditions implied or conditions in law are those which are created by the common or statute law without any express words. Thus to the grant of every estate is annexed by law an implied condition that the grantee shall not commit felony or treason. *Litt. s.* 325.

Lord Coke says that there is a condition in law or an implied condition annexed to every estate tail after possibility of issue extinct, and also to every estate by the curtesy, in dower, for life, or years, that if the tenants of these estates alien in fee or claim in a court of record a greater estate than they are respectively entitled to they shall forfeit their estates, and the person in remainder or reversion may enter. 1 *Inst.* 233 b. And where a grant of lands is made to a corporation a condition is annexed by law, that if the corporation ceases to exist the land shall revert to the donor or his heirs.

pay

* P. 118.

pay me £10 at Michaelmas, he shall have such a ground of mine for ten years; or where I make a lease of land to I. S. for ten years, provided that if he pay me £10 at Michaelmas, he shall have the land to him and his heirs; and in these cases, by the performance of the condition the estate is acquired (c). And some of them are subsequent, and executory, *i. e.* when the estate is executed, but the continuance thereof dependeth upon the breach or * performance of the condition; as where a lease is made for years, on condition that the lessee shall pay £10 to the lessor at Michaelmas, or else his lease shall be void; and in this case by the performance of the condition the estate is held and kept. These conditions also are some of them in the affirmative, *i. e.* that do consist of doing, as provided that the lessee shall pay the rent, or pay £10 to the lessor, &c. And some in the negative, *i. e.* that consist of not doing, as provided that the lessee shall not alien, &c. And some of them are in the affirmative, which imply a negative, as provided that if the rent be unpaid, that the lessor shall re-enter, which implieth a negative, *viz.* not paid. Conditions also are some of them collateral, *i. e.* when the act to be done is a collateral act, as that the party shall pay £10, go to Rome, or the like. And some are inherent, *i. e.* such as are annexed to the rent reserved out of the land whereof the estate is made. And some of them also are restrictive and contain a restraint, as that the lessee shall not alien, or do waste, or the like. And some are compulsory, as that the lessee shall pay to the lessor £10 such a day, or his lease shall be void. And some of them be single, *i. e.* to do one thing only. And some copulative, *i. e.* to do divers things. And some disjunctive, *i. e.* when one thing of divers is required to be done (d). And some conditions make the estate whereunto they are annexed voidable only, by entry or claim. And some of them make the estate void, *ipso facto*, without entry or claim. And sometimes they tend to destroy estates, sometimes to make, or to enlarge estates, and sometimes neither to make nor destroy, but only to clog

Co. super
Lit. 201.

(c) Where the condition must be performed before the estate can commence, it is called a *condition precedent*; as where an estate is limited to A. upon condition of his marrying B. there the marriage with B. is a condition precedent, and till the marriage takes place no estate vests in A. See *Show. Parl. Cas.* 83. and see further 1 P. Wms. 284. 2 Atk. 18. 1 Ves. sen. 4. 2 Bro. Rep. 67. But where the effect of a condition is either to enlarge or defeat an estate already created, it is then called a *condition subsequent*. See *Spring v. Caesar*, 1 Roll. Abr. 415. A copyholder in borough English surrendered to the use of himself for life, and after to the use of his eldest son and his heirs if he lived to the age of twenty-one, provided and upon condition that if he died before twenty-one it should remain to the surrenderor and his heirs. It was resolved that though by the first words it seemed to be a condition precedent, yet upon all the words taken together, it was not; but that the eldest son took an immediate vested estate to be defeated upon a condition subsequent. *Edwards v. Hammond*, 3 Lev. 132. But for further information respecting the nature and doctrine of conditions precedent and subsequent, see 2 P. Wms. 419, 626. 1 Vern. 83. 3 Chan. Ca. 150. 3 Lev. 132. 1 Wood, 273. *Ca. Temp. Talb.* 166. *Swinb.* 267. *Eq. Ca. Abr. Conditions (B).* *Bac. Abr. Conditions (1) Vin. Abr. Conditions (T.) Com. Dig. Conditions (B.) Fearn on Conting. Remain.* 3d edit. 313. 2 Burr. 299. 4 Burr. 1930. 1 Wils. part 1. p. 105, 136.

(d) If the condition be in the copulative, and it is not possible to be so performed, it shall be taken in the disjunctive. See fully as to conditions copulative and disjunctive, *Vin. Abr. Conditions (S. b. and Y. b. 2.)*; and see also *infra*, page 133, notes (a) and (b), and page 138, notes (q) and (r).

estates.

estates, as where a lease is made rendering rent on a day, on condition if it be not paid that the lessor shall enter on the land and keep it till the rent be paid. And all these ways conditions may be lawfully made. *Inesse potest donationi modus, conditio sive causa.*

Lit. sect. 327.

Co. 8. 44. 3. 65.
Lit. 325. 378.
F. N. B. 205.

The conditions in law, or implied, are either by common law, or by statute laws. The first sort, are some of them founded on skill, as where an office is granted, there is a condition *tacite* implied, that if the grantee doth not execute it faithfully according to the trust, the grantor may put him out. And some are without skill, as where an estate is made for life or years of land, there is this condition implied, that if the lessee do waste, he shall forfeit the place wasted, or if the lessee make a feoffment of the land, he shall forfeit his estate, and the lessor shall enter. And where an estate is made in fee of land; this condition is implied, that the feoffee shall not alien it in mortmain. And these conditions do sometimes give a recovery, and no entry, as in the case of waste. And sometimes they give an entry and no recovery, as in the case of alienation in mortmain. In the case of exchange also there is a condition in law, for which see *Exchange*.

Co. 4. 121.

21 H. 7. 24.
Perk. sect.
707, 708, &c.

It is a general rule, that when a man hath a thing he may condition with it as he will. Conditions indeed therefore may be annexed to things inheritable, to frank tenements, or to chattels real and personal: as for example, if a feoffment in fee, gift in tail, or lease for life, be made of lands or tenements, or a grant be of a rent, common, or the like thing, in fee-simple, fee-tail, or for life, these things may be done upon condition. So a lease for years of land, or a grant of a rent, &c. for years, may be made upon condition (e). And a lease may be made for five years on condition, that if the lessee pay to the lessor within the first two years ten marks, then he shall have the fee, otherwise but for five years. Also a guardian in chivalry may grant the wardship of the body and land, or either of them, on condition. Tenants by statute merchant, staple, or elegit, may grant their estates upon condition. The lord may grant his seigniority to his tenant on condition. The tenant for life may grant his estate to his lessor, or him in reversion, upon condition. The king may make letters patents of denization to an alien, or a charter of pardon to a man for his life, upon condition. Also releases and confirmations may be made upon condition. And a submission to an award may be made upon a condition. But an institution to a benefice, or an induction, may not be on a condition. An attornment, or an express manumission of a villain, cannot be upon a condition subsequent, as it may be upon a condition precedent. And a condition cannot be released upon a condition, as some hold. But the contrary is held by others clearly, and that

Perk. sect.
281.
Co. super
Lit. 274.
Perk. sect.
724. Co. 8.
2d. Dier 242.

Co. 2. 74.
Co. super
Lit. 274.

P. 119.

3. What things may be made and done upon condition: and to what things a condition may be annexed; or not; and how it may be made and annexed thereunto.

(e) With respect to conditions annexed to things executed, the condition must be created or annexed to the estate at the time the estate is conveyed or devised, and not at any time after. Rot. pt. vol. iii. p. 61. But as to things executory, such as rents, annuities, &c. it is held that the condition may be created after the execution of the deed or will by which the rent, &c. is conveyed or devised. 1 Inst. 237 a. and see infra, page 126, note (e).

there is no difference between this and a release of a right: *ideo quere* (f). An award cannot be made on a condition, as was held in *Sherer's case*, 35 *Eliz.* A contract or sale of a chattel personal, as an ox or the like, may be upon condition, as if *A.* sell his horse to *B.* that if *A.* do such an act, then *B.* shall pay £5 at the day agreed upon, otherwise but £4. So if I agree with a physician, that if he cure such a disease he shall have so much; and in this case he cannot have the money until he have done the cure. As where I promise a man £10 when he hath built such a house, in this case he cannot have the money until the house be built. Also retaining of servants, delivery of charters, and divers other things, may be done upon condition. And if an executor assent to a legacy upon a condition; the assent is good, but the condition is void.

Perk. sect.
712, 713.

Co. 4. 28.

And conditions annexed to estates in all the cases before, howsoever they are most frequently and safely made by deed in writing, yet it seems such conditions may be made and annexed to any estate of a thing grantable without deed, without any writing at all; howsoever in some cases it cannot be well pleaded, nor used without a deed; for it is a rule, that if a condition be pleaded * in any action to defeat a freehold, the deed wherein the condition is contained must be shewed. But of chattels real, as leases for years (g), and the like, or grants of chattels personal, a man may plead that such leases and grants were made upon condition, without shewing the deed. And in the first case also of a condition to avoid a freehold, it may be given in evidence to a jury, and they may find the matter at large as it is, and so the party may have advantage of the condition without shewing any deed of it. Also the pleading of a feoffment in fee on condition, without deed and re-entry, is good, if the party confesses the condition. A condition may be annexed to a limitation of uses, and thereby the same may be made void. See *Use* (h).

Lit. sect. 365.
Co. super
Lit. 161. 216.
Doct. & Stu.
16. Perk.
sect. 715.

* P. 120.

Co. 5. 40.

Co. 2. 90.

4. The nature of a condition in deed, and of a limitation.

The nature of an express condition annexed to an estate in general, is this; that it cannot be made by nor reserved to a stranger; but it must be made by and reserved to him that doth make the estate. And it cannot be granted over to another, except it be to and with the land or thing unto which it is annexed and incident. And so it is not grantable in all cases; for the estates of both the parties are so suspended by the condition, that neither of them alone can well make any estate or charge of or upon the land; for the party that doth depart with the estate, and hath nothing but a possibility to have the thing again upon the performance or breach of the condition, cannot grant or

Co. super Lit.
186. Perk.
sect. 812. Lit.
sect. 358.
Dier 6.

(f) It is said that a condition cannot be released upon condition; but that the condition annexed to the release shall be void and the release shall be good. Co. Lit. 274 b. Com. Dig. Conditions, (A. 2.)
(g) Since the statute of Frauds, (29 Car. 2. c. 2.) a condition intended to defeat or enlarge an estate or interest in lands, except leases not exceeding the term of three years, must, it is apprehended, be in writing.

(h) Conditions annexed to estates created by the operation of the statute of Uses, differ in some material particulars from conditions at common law. The subject however will be more fully considered in the chapter which treats of *Uses*. And see the note at the end of the present chapter on the subject of conditional limitations.

charge

Dier 298. Co.
8. 44. Perk.
sect. 818, 819.

charge the thing at all. And if he that hath the estate, grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereunto it is annexed: so that although the same do pass through the hands of an hundred men, yet is it subject to the condition still; and albeit some of them be persons privileged in divers cases, as the King, infants, and women covert, yet they also are bound by the condition (i). And a man that comes to the thing by wrong, as a disseisor of land, whereof there is an estate upon condition in being, shall hold the same subject to the condition also. And when the condition is broken or performed, &c. the whole estate shall be defeated: so that if there be a lease for life made by deed, and not by will, the remainder over in fee, on condition that the lessee for life shall pay ten pounds to the lessor; if the lessee pay not this ten pounds, the estate in remainder is avoided also. *Et sic e converso*, unless by special limitation it be otherwise provided; as if A. grant by indenture land to B. for life, the remainder to C. in fee, rendering rent to A. and his heirs, with condition that if the rent be behind, to re-enter, and retain the land during the life of B., and no more, and A. doth enter in the life-time of B. for non-payment; this doth not destroy the remainder. And if tenant for life and he in remainder join in a feoffment, on condition, that if, &c. then the tenant for life shall re-enter; this * is good, without defeating the entire estate: for regularly a condition cannot avoid a part of an estate only, and leave another part entire (k); neither can the estate be void as to one person, and good as to another, (except it be in case of a condition annexed to an estate limited by way of use, as in *Frances's case*, Co. 8. 90.) And yet if A. make a gift in tail to B. the remainder to B. in fee upon condition not to alien, and B. doth alien; this doth defeat the estate tail only, and not the remainder (l). Also the whole estate of the whole, and not of some part only, shall be avoided; except by agreement the condition be specially restrained to some part, and the re-entry given in that part only; as where a feoffment is made of two acres, on condition that if such a thing happen, the

* P. 121.

Co. 4. 121.
Dier 127.

(i) Although regularly no laches shall be accounted in infants, or feme coverts, for non-entry, or non-claim to avoid descents, yet laches shall be accounted in them for non-performance of a condition annexed to the state of the land. Co. Lit. 246 b.

(k) It is a rule that a condition (a strict common law condition) must defeat or determine the whole of the estate to which it is annexed and not determine it in part only and leave it good for the rest. Rep. 86 b. 6 Rep. 40 b. The case however is different as to a conditional limitation, or condition operating under the statute of Uses; as also in the case of conditions annexed to mere trust estates.

(l) Conditions restraining, generally, tenant in tail from alienating the estate or from levying a fine suffering a recovery are void. See numerous authorities cited Fearn's Contingent Remainders, 2d. ed. p. 257, et *infra*. Conditions however may be annexed to an estate tail, but such conditions if conditions subsequent may be destroyed by a recovery suffered before the time appointed for the performance of the condition. Where the language of a condition annexed to an estate tail has been upon non-performance of the condition, "the estate tail should cease as if the tenant in tail be dead," such a condition has been held to be void, because the death of the tenant in tail does not terminate the estate tail, but his death without issue.

feoffor,

feoffor shall enter into one of them. And further when he that hath right doth re-enter by force of such condition, he shall avoid all charges and incumbrances put upon the land after the condition made; for he that doth enter into land by force of such a condition, must have it again in the same plight as it was when he parted with it. And finally, a condition for the most part will not determine the estate without entry or claim. So that howsoever a limitation hath much affinity and agreement with a condition, and therefore it is sometimes called a condition in law^b, both of them do determine an estate in being before; and a limitation cannot make an estate to be void as to one person, and good as to another; as if a gift be made in tail to one and his heirs males, until he do such a thing, and then his estate to cease and go to another: yet herein they differ; 1. A stranger may take advantage of an estate determined by limitation, and so he cannot upon a condition (m). 2. A limitation doth always determine the estate, without entry or claim, and so doth not a condition.

Perk. sect. 840.

See infra.

^a Lit. sect. 380.

^b Co. 9. 128.

8. 17. 6. 41.

Plow. 413.

Co. 10. 40.

Dier 300.

Lit. sect. 90.

5. When an estate shall be conditional; and what words will make a condition, and what not; and how a condition may be known from a covenant, or limitation.

Proviso. Its quod. Sub conditions.

Si, si contingat.

* P. 122.

Conditions annexed to estates are sometimes so placed and confounded amongst covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know therefore that for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as *proviso, ita quod*, and *sub conditione*. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, provided that, or so as, or under this condition, that *B.* do pay to *A.* ten pounds at Easter next; this is a good condition, and the estate is conditional without any more words. But there are other words, as *Si, si contingat*, and the like, that will make an estate conditional also, but then they must have other words *joined with them, and added to them in the close of the condition, as that then the grantor shall re-enter, or that then the estate shall be void, or the like. And therefore if *A.* grant lands to *B.* to have and to hold to him and his heirs, and if, or but if it happen, the said *B.* do not pay to *A.* ten pound at Easter, without more words, this is no good condition; but if these or such like words be added, that then it shall be lawful for *A.* to re-enter, then it will be a good condition (m).

Co. 2. Lord Cromwell's case, 10. Mary Portington's case, Co. sa-per Lit. 204. 27 H. 8. 16. Lit. sect. 322. 323, 330, 331.

(m) The benefit of a condition at common law (it is different in the case of a condition operating under the statute of Uses,) can only be reserved to the donor, feoffor, or lessor, and their heirs, and not to a stranger. For it is a maxim of the common law that nothing which lies in action, entry, or re-entry, can be granted over in order to discourage maintenance and litigation. And where in the creation of a condition the benefit of it is not expressly limited to the feoffor, lessor, &c. and his heirs, yet the law reserves the benefit of it to his heirs; for as they are persons prejudiced by alienation it is but reasonable that they should be entitled to the same means of recovering the estate as their ancestors.

(n) See more fully by what words a condition may be created, in Bac. Abr. Conditions (A.) and Vin. Abr. Condition (C.) (D.) (H).

H

Co. super Lit.
146. Co. 2. 70.
Dier 152. 311.
Lit. Bro. 236.
Dier 6. 222.
Plow. 136.
5 H. 7. 7.
Perk. sect.
732.

But here note that these words *proviso, ita quod*, and *sub conditione*, albeit they be the most proper words to make conditions, yet do they not always make the estate by the deed to be conditional, but sometimes do serve for other purposes; for the word *proviso* hath divers operations besides; for sometimes it doth serve for and work a qualification, or limitation, and sometimes it doth serve to make and work a covenant only (o). And then only (being inserted amongst the covenants of the deed) it doth make the estate conditional, when there are these things in the case: 1. When the clause wherein it is hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of itself: 2. When it is compulsory to the feoffee, donee, &c. 3. When it comes on the part, and by the words of the feoffor, donor, lessor, &c. 4. When it is applied to the estate, and not to some other matter; as if one grant a manor with an advowson appendant, and after the *habendum* and reservation of rent, amongst the covenants, there is this clause inserted [provided that the grantee shall regrant the advowson for the life of the grantor] this is a good condition. And thus it may be also a condition, and a covenant: as if the words run thus, provided always, and the feoffee, &c. doth covenant, &c. that neither he nor his heirs shall do such an act, this is both a condition, and a covenant. But if the clause have dependence on another clause of the deed, or be the words of the feoffee, &c. to compel the feoffor to do something, then is it not a condition but a covenant only; as if there be in the deed, a covenant that the lessee shall scour the ditches, and then these words follow [provided that the lessor shall carry away the earth:] or if there is a covenant that the lessee shall repair the houses, and then these words follow [provided that the lessor do provide timber.] So if this clause be applied to some other thing, and not to the thing granted, then is it no condition, as if a lease of land be made rendering rent at B. provided that if such a thing happen, it shall be paid at C.; this doth not make the estate conditional. Or a lease is made for years without impeachment of waste, *proviso quod non prosternet domus voluntarie*; in this case, howsoever this doth make the privilege, yet doth it not make the estate conditional. Or a lease is made for years rendering rent, * provided that the lessor, shall not distrain for the rent; in this case this is a good condition, but not annexed to the estate. So if in a deed of bargain and sale of land, after the *habendum*, there are these words, viz. upon these conditions following, viz. that if the vendor pay the vendee twenty pounds at Easter, and enfeoff him of a meadow called S. before Whitsuntide, that the bargain shall be void. Provided nevertheless that the bargainer shall hold the land for twenty years without the let of the bargainee; it seems this provided, in this case, doth not make a condition.

Covenant.

* P. 123.

Dier 318.

(o) See accordingly Co. Lit. 203 b. Moor 307. 707. What shall be a condition, and not a covenant, Bac. Abr. Condition (G.) Nels. Abr. Condition (B.)

So if a lease be made of a house, and amongst the covenants these words are inserted, [provided also that if the lessor will dwell upon it, or keep it in his hands, then the lessee, his executors and assigns, doth covenant upon one year's warning to remove and give place to the lessor, this lease notwithstanding;] it seems this is no condition but a covenant only. * If a lease be made provided that if the rent be behind, without any more words; this is no good condition.

The word *si* also doth not always make a condition, for sometimes it makes a limitation; as when a lease is made for years, if *I. S.* shall live so long.

There are other words also that in the King's grant, in last wills and testaments, and other special cases do make conditions, as *ea intentione, ad effectum, propositum, intentionem*, paying, and the like. So that if one devise his land to *I. S. ea intentione, &c.* that he shall pay to *W. S.* ten pounds, or paying, or so as he pay to *W. S.* ten pounds, or to sell, &c. these are good conditions (*p*). But these words regularly do not make a condition when they are used in deeds. And therefore if one make a feoffment in fee *ea intentione, ad effectum, &c.* that the feoffee shall do, or not do, such an act; these words do not make the estate conditional, but it is absolute notwithstanding. And yet perhaps these words being conjoined with some others may make a condition; as if lands be granted *ea intentione quod si defecerit, &c. tunc quod reintrabit*, or the like.

Also conditions are sometimes made, especially in estates and leases for years, without any of these formal words, when the apparent intent of the lessor is to make the estate conditional; albeit the words be not used as the words of the lessor, but as the words of the lessee, or indefinitely of neither. And therefore it hath been said, that if an indenture be made between *A.* and *B.* thus: it is agreed and covenanted between the parties aforesaid, that *B.* shall have the land for years, and that he shall not alien it; that this estate is conditional: But it seems this is not law (*q*). But if this clause be inserted amongst other covenants,

27 H. 8. 13.
Bro. Condition 7.

* Curia Pasche
14 Jac. H. R.
in the case of
Muddy Garam.
Co. super Lit.
204.

Co. super Lit.
236, 237. Doct.
& Stud. 132.
Dier 138.
Plow. 142.
7 H. 4. 22. Co.
super Lit. 204.
Ca. 10. 42.
Dier 318.
Doct. & Stud.
34.

Doct. & Stud.
94. Dier 6.
91. 63. 92.

(*p*) *A.* devised lands to *B.* paying £40 to *C.* it is a good condition; for *C.* has no other remedy and a will ought to be expounded according to the intent of the devisor. Vin. Abr. Condition (I) pl. 9.

(*q*) If lease be made to a man and his assigns for twenty-one years, provided that he shall not assign, the proviso being repugnant to the premises is void; but it would have been good, if the word *assigns* had been omitted. Moor, 881; so it would be good although the word *assigns* was in the premises, in case the proviso was, that he should not assign *without the lessor's consent*.

In *More's case*, (Cro. Eliz. 26.) a lease for years was upon condition that the lessee, his executors or assigns, (omitting administrators,) should not alien without the assent of the lessor. The lessee died intestate, and administration was granted to *J. S.* who assigned without licence: And it was adjudged, that the condition was broken as the administrator was an *assignee* in law.

So where a condition was, that if the lessee, his executors, administrators, or assigns, demised the lands for more than from year to year, that then the lease should be void; it was held that the condition was broken by a *devise* of the lease. See *Berry v. Stanton*, Cro. Eliz. 331; but see *Fox v. Siream* Sty. 483, which is *contra*. A proviso or condition in a lease, that the lessee his executors or administrators, shall not assign or underlet without licence on pain of forfeiture,—an under-lease by the administratrix of the lessee will occasion a forfeiture. See *Roe v. Harrison*, 2 T. R. 428.

Conditions like the above, being in restraint of alienation are not favored in law but are construed strictly in favour of the lessee. It has therefore been determined, that such a condition only affects

the

venants, viz. If the lessee hinder the lessor to fell, cut, and carry away the trees upon the lands devised, that the lessor may re-enter and the lease shall be void; this is a good condition, and so it hath been adjudged in the case of *Haward and Fulcher, Hil. 3 Car' B. R.* And if a lessee for years do covenant in his lease, that if he, his executors, or assigns, shall alien, that it shall be lawful for the lessor to re-enter; it seems this is a good condition, and not a covenant only (r). And if a lease for years be made, and this clause is inserted in the deed, it is agreed between the parties, that if the lessee do not pay ten pounds to the lessor at Easter, from thenceforth the lease shall be void; this is a good condition. And if a lease be made with this clause inserted in the deed, it is agreed that whosoever shall have the estate or interest, that he or they shall find sureties within the year for the rent, otherwise the estate shall cease; it seems this is a good condition. And if a lease for years be made with this clause inserted, and that it shall not be lawful for the lessee to alien without licence of the lessor, under pain of forfeiture; this

* P. 124.

Dier 66, 63.
Curia Mich.
37, 38 Eliz.
B. R.

the lessee and does not extend to his assignee; so that if a lessee who is restrained from alienation without the consent of the lessor, assigns his lease with consent, the assignee may assign to any other person without any further consent. *Dumpe's case*, 4 Rep. 119. *Whitchott v. Fox*, Cro. Jac. 398. (though query of this doctrine, and see *infra*, page 126, note (e). And although the licence should be, that the assignment should be made subject to the performance of the covenants, provisions, and conditions contained in the lease the assignee may, nevertheless, assign without further licence. See *Drumell v. Macpherson*, 14 Ves. 173. But a fresh condition may be annexed to the lease, see *infra*, page 126, note (e)).

Where there is a proviso or condition in a lease, that the lessee shall not assign without the permission of the lessor, an under-lease has been adjudged not to be within the proviso. See *Cruce v. Blencoe*, 3 Wils. Rep. 234. 2 Bla. Rep. 766.

But if a lease contains a proviso, that the lessee shall not assign, let, or demise the whole or any part of the premises without leave in writing of the lessor, in a case like this neither an assignment or under-lease can be made. See *Roe v. Harrison*, 2 T. R. 426; and see *Roe v. Seales*, 1 Maule & Selw. 297. And where the proviso was, that the lease should be void "if the lessee assigned or otherwise parted with the indenture of lease, or the premises thereby demised, or any part thereof, for the whole or any part of the term without leave in writing," it was held, that the lessee was restrained from making an under-lease. *Doe v. Worsley*, 1 Campb. N. P. 20. Though a condition, generally, against assigning or underletting will not restrain an assignment by operation of law, as by the assignees of the lessee in case he becomes a bankrupt, (*Doe v. Bevan*, 3 Maule & Selw. 353; and *Doe v. Smith*, 5 Taunt. 795.) or by the sheriff under an execution, (*Doe v. Carter*, 8 T. R. 57;) yet an express condition against assignments by operation of law may be inserted in leases for years: as where in a lease for years a proviso was inserted, that upon the tenant's becoming a bankrupt the landlord might re-enter, and the proviso was held to be good. *Roe v. Galliers*, 2 T. R. 133. So if the proviso was, that the lessor should re-enter in case the lessee suffered the lease to be taken in execution or to be extended, the proviso would be good. Even where the proviso or condition only restrains assigning generally, without expressly making the lease void or giving a power of re-entry upon the lessee allowing the lease to be taken in execution, yet if the lessee confesses a judgment for the express purpose of having the lease taken in execution, this would be deemed a fraud and a breach of the condition,—and the lessor would have a right to re-enter. *Doe v. Carter*, 8 T. R. 300. Conditions or powers of re-entry for non-performance of covenants are generally contained in leases. For breach, however, of such conditions, equity will in many cases relieve. But this point will be more fully noticed hereafter. No relief however will be afforded by equity in the case of the breach of a condition not to assign. *Hill v. Barclay*, 18 Ves. 656.

It may be proper to observe, that if the lessor accepts rent (or it is conceived, does any other act, recognizing the lessee as his tenant,) after a breach of the condition, it is a waiver of the forfeiture, provided the lessor had notice of the breach of the condition. See *Whitchott v. Fox*, Cro. Jac. 398. *Goodright v. Davids*, Cowp. 804. But it has been held, that the lessor having waived his right of re-entry for a forfeiture incurred by the lessee for having made one underletting, does not preclude him from re-entering upon the lessee making a subsequent underletting. *Doe v. Bliss*, 4 T. R. 735.

(r) And the lessor may take it as a covenant or condition, but not as both. *Dals. 8. Bac. Abr. Condition (G.)*

is a good condition (s). And if a lease for years be made of a house, with this clause inserted in the deed, and the lessee shall continually dwell in the same house upon pain of forfeiture of the said term; this is a good condition. And if in a lease for years the lessee covenant to pay so much rent, and then these words are inserted. And if it shall happen, that the said yearly rent, &c. then the lessee doth covenant and grant, &c. that the lease shall be void; it seems this is a good condition, and so hath it been ever taken; as was said by Justice *Dodridge, Hil. 3 Car.* And in all these cases the estate is conditional. But in cases of feoffments in fee, gifts in tail, and leases for life, it seems that words penned in this manner will not make conditions, but that in these cases the precise and formal words of a condition are requisite (t). And therefore if a feoffment be made by deed, and therein is inserted this clause, that it is agreed, or that the feoffee doth covenant, that if the feoffor do such an act, the feoffor shall re-enter; this is no condition, nor the estate hereby made conditional. And yet see *Perk. sect. 744.*

Dier 79. 27.
Co. super Lit.
204.

Plow. 132.

Co. super Lit.
204. Doct. &
Sta. 94. Dier
65. 138.

If one make a lease for years on condition to pay rent at four feasts, and after there is a clause in the deed, and if the rent shall be behind, &c. that he shall distrain; this clause doth not take away the condition, but the same doth continue, and the estate is conditional still. See more in the next question.

Dier 348.

In the making of estates the cause is regarded. And in case of the grant of lands or tenements, *causa* doth sometimes make a condition, as if a woman give lands to a man and his heirs, *causa matrimonii prælocuti*; in this case, if she either marry not the man, or the man refuse to marry her, she shall have the land again to her and her heirs. But on the other side, if a man give land to a woman and to her heirs *causa matrimonii prælocuti*, though he marry her or the woman refuse, he shall not have the lands again to him and his heirs. And in the case of a grant executory the word [*pro*] may make a

Co. super Lit.
204.

* P. 125.

* condition. And therefore if a man grant me an annuity *pro una acra terræ*, or *pro decimis*, &c. or if he grant me an annuity for a way, or a gutter through my ground, this is conditional, and if he be disturbed in the way, acre of land, tithes, or gutter, he may refuse to pay the annuity. So if an annuity be granted to an officer for the executing of his office; or *pro consilio impendendo*, if the grantee do not execute the office, or give counsel, &c. the annuity shall cease (u). But if one grant me tithes,

Co. super Lit.
204. Co. 10. 42.
Plow. 141.
9 Ed. 4. 19.
15 Ed. 4. 2.
Dier 6.

(s) See *supra*, last note but one.

(t) Words of an *express condition* shall not ordinarily be construed as a *limitation*; but where an estate is to remain over for breach of a condition, which is by express words a *condition*, yet it ought to be intended as a *limitation*, *per Holt*, 11 Mod. 61. *Page v. Hayward*, 2 Salk. 570. S. 42. But see the note at the end of the chapter on the subject of conditional limitations.

(u) Regularly the word *pro* does not import a condition; but when the thing granted is executory, and the consideration of the grant is a service, or some such thing for which there is no remedy but stopping the thing granted; as in the case of an annuity granted *pro consilio*, &c. the word *pro* has the force of a condition, but not of a condition *precedent*, and therefore the performance thereof need not be averred when the annuity is demanded; but in the case of a personal contract, as, If I sell you my horse for £10, it works by condition *precedent*, and you shall not take my horse, except you pay me £10, *per Hobart*, Ch. J. *Hob. 41.*

or an annuity, and I grant an annuity for these tithes, or grant to give counsel for the annuity; it seems the grants that are in this manner are not conditional, but absolute. So if I *pro consilio*, &c. or *pro una acra terra*, &c. make a feoffment in fee, or lease for life of another acre, these estates are not conditional (x). And if one devise land to be sold by his executors, and to be distributed for his soul; by this it seems the estate or power of the executors is conditional. So if one devise his land to find a preacher or a chaplain (y). But otherwise it seems it is of land so conveyed by deed in a man's lifetime. And if a feoffment be made of land *ad erudiendum filium*; some have said this estate is conditional.

Testament.

Dier 7. 127.
See Testament.

Plow. 141. 142.

Co. super Lit.
234. 235. Co.
10. 42. Plow.
413. Lit. sect.
90. Dier 290.

The most apt and proper words to make a limitation of an estate, are, *Quamdiu, dummodo, dum, quousque, si*, and such like. And therefore if A. grant lands to B. to have and to hold to him and his heirs, until B. go to Rome; or until he be promoted to a benefice; or until B. pay to A. or A. pay to B. twenty pounds; or so long as I. S. shall live; or if A. grant lands to B. to have and to hold to him, his executors, &c. if I. S. and I. D. shall live so long. Or if A. grant lands to B. to have and to hold to him for the life of B. so that B. pay twenty pounds to A. at Easter following; these are not conditional, but limited to estates. So if A. grant lands to B. to have and to hold to him, for so long as he shall keep himself a widower, or *dum sola fuit*, or *durante viduitate* (x), if the grantee be a widow, these are good limited estates, but these words do not make the estates to be conditional (a).

Limitation.

Dier 125.
Plow. 159.
Perk. sect.
740.

If the words in the close or conclusion of a condition be thus, That the land shall return to the feoffor, &c. or that he shall take it again, and turn it to his own profit; or that the land shall revert, or that the feoffor shall *recipere* the land; these are either of them good words in a condition to give a re-entry, as good as the word [*re-enter*] and by these words the estate will be made conditional.

Co. super Lit.
235. 234. Co.
8. 46.

The tenant by the curtesy, the tenant in tail after the possibility of issue extinct, the tenant in dower, the tenant for life, the tenant for years, by statute, or elegit, guardian, &c. do hold their estates subject to a condition in law; so that if either of them alien his land in fee, or claim a greater estate in a court of record than his own, 6. What shall be said a condition in law, and when an estate shall be subject to such a condition.

(x) If the conveyance of the one acre was in consideration of the conveyance of the other, this, if the estates were of the same quality, would be an exchange, to which there would be the implied condition of re-entry upon eviction.

(y) Such devises would be void. See statute 1 Edw. 6. c. 14. and 9 Geo. 2. c. 36. and see Mr. Thomas's very valuable edition of Co. Litt. vol. i. p. 187, note (e), for some useful information respecting devises and gifts to superstitious and charitable uses.

(z) In the case of *Lawrence v. Lawrence*, 2 Vern. 365. a devise by the testator to his wife of a part of his estates during her widowhood, was held not to be an implied satisfaction of her dower. Where however such a devise is expressly made in satisfaction of her dower, or where from circumstances it is to be inferred that the testator intended it in lieu of her dower, there she will be compelled to elect between the property devised and her dower. And see Treatise on Marriage Settlements, page 547, note (b), for further information as to what shall be deemed an implied satisfaction of dower, and consequently where the wife must elect whether she will take her dower or what is given her in lieu of it.

(a) Whilst she continues sole or during widowhood is the full period assigned for the duration of the estate, consequently the case is not like that of a larger estate made to determine in case of marriage which would be a conditional estate.

he doth forfeit his estate (b), and he in remainder or reversion may enter; and if such a tenant do waste, he in reversion shall recover the place wasted (c). The tenant in fee-simple doth hold his estate subject to a condition in law; so that if he alien his land in mortmain, he doth forfeit it, and the lord may enter upon him. So also he that doth take land in exchange, doth hold it under a condition in law, viz. that if the land he give in exchange for that land be recovered from him that hath it, that he shall enter upon his own land again. Also every officer that hath to do in the administration of justice, all keepers of parks, stewards, beadles, bailiffs, and such like, hold their offices under a condition in law; so that if they do not duly execute it, and do not all that thereunto doth appertain, they may forfeit them, and the grantor may put them out. *In quo quis delinquit in eo est de jure puniendus* (d).

7. What shall be said a good condition in deed or limitation in its original creation; and what not.

1. For the manner, frame, and order of making it.

To every good condition is required an external form, i. e. words to declare an intent in the party to have the estate conditional, as in the cases before: and an internal form, i. e. such matter as whereof a condition may be made.

As to things executed, the condition must be made and annexed to the estate at the time of the making of it; but as to things executory, it may be made afterwards. And if the condition be made in another deed, and not the same deed wherein the estate is made, if it be delivered at the same time, it is as good as if it were contained in the same deed. And therefore if a man make a feoffment, lease, or the like, by one deed absolute, and at the same time make another deed of defeasance or condition, and

Perk. sect.
717. Co. 1.
113. Plow.
133. Co. super
Litt. 146. 217.
Co. 2. 71.

(b) A forfeiture would not be incurred where the alienation was made by a conveyance which is not a tortious conveyance; as by lease and release, bargain and sale, or covenant to stand seised. But if the alienation was made by feoffment, fine, or recovery, a forfeiture might be incurred. If made, however, by fine or recovery, a forfeiture is not necessarily incurred; as where the fine is levied by a tenant for life and it is expressly confined to the life estate; or where the recovery is suffered by a tenant for life who has a remote estate tail. See *supra*, pages 14 and 43, and notes (a) and (u).

(c) Waste is either *voluntary*, as by pulling down a house; or it is *permissive*, as by suffering it to fall for want of necessary repairs; 2 Inst. 145. An action of waste lies against tenant by the curtesy, in dower, for life, &c. by him that hath the immediate estate of inheritance for waste or destruction in houses, gardens, woods, trees, or in land, meadows, &c. to the disherison of him in reversion, or remainder, Co. Lit. 53 a. The doctrine of waste, though very material, is but little explained in the Touchstone. It is not within the compass of a note to supply the deficiency. The Editor will therefore content himself by referring the reader to some authors respecting waste, under the four following general heads, in order to facilitate his inquiry into any particular point of that doctrine:—

- 1st. What shall be deemed waste, and its different kinds, Co. Lit. 53 a. 5 Co. 12. Com. Dig. Waste (D 1). 2 Roll. Abr. 814. 2 Bl. Com. 281. Bac. Abr. Waste (A). Observations upon estates for life respecting waste, 8vo. printed for Uriel, 1777.
- 2d. Of what things, and in what manner, waste may be made. 5 Co. 12. 21. 7 Co. 15. Vin. Abr. Waste (C) and (D). Bac. Abr. Waste (C).
- 3d. By whom, and against whom, remedy may be had for it, Co. Lit. 285 a. 2 Roll. Abr. 826. 6 Co. 37 b. 11 Co. 49. Wright's Ten. 44. 2 Inst. 299. Stat. 6 Ann. c. 31. Bac. Abr. Waste (G), (H). 3 Bl. Com. 223. Com. Dig. Waste (C 1). 1 Ves. 521. 2 Atk. 383.
- 4th. At what time, and in what manner, that remedy may be obtained, Co. Lit. 356 a. Br. Abr. Waste, pl. 42. F. N. B. 59. 2 Inst. 146. 306. Bac. Abr. Waste (I). Vin. Abr. Waste (M). (L. a). In what cases Injunction granted, Vin. Abr. Waste (R a). Eq. Ca. Abr. Waste. 1 Ves. 546. 2 Atk. 183.

(d) In like manner to all *Franchises* there is a condition in law annexed, that they shall not be aliened. Mir. ch. 5. § 4. 2 Inst. 223. Com. Dig. Condition (R.) What shall be deemed a breach of a condition in law, see in Com. Dig. Condition (S.)

deliver

deliver both together, this is a good condition, and will make the estate conditional. But if the defeasance be sealed and delivered before, or after the deed, *contra*. And therefore if one make an absolute feoffment in fee, and before or after the sealing or delivery of that deed, the feoffor declare himself by deed, or the feoffor and feoffee agree by deed, that the estate made before, or to be made after, shall be conditional, yet this is not conditional. And yet if an annuity be granted absolutely by one deed, and after the grantee grant to the grantor, that if the grantor do such a thing, the annuity shall cease: in this case the annuity is conditional (c).

Co. 146. Hil.
42. Jac. B. R.
Warner's case,
Co. 1. 112. Al-
bany's case.

Dier 126. 348.

A condition may be annexed to an estate by way of use; as if a feoffment be made to *A.* to the use of *B.* and his heirs, on condition that *B.* shall pay to the feoffor twenty pounds such a day; this is a good condition. So if one covenant to stand seised of lands to the use of *B.* and his heirs, on condition that if he pay him ten pounds, the use shall be void, or the like. Also a condition may be annexed to an estate created by will; as if one devise land to *I. S.* for his life, provided that he pay ten pounds yearly to *I. D.*; this is a good condition. Whereof see in *Testament*.

Co. 8. 17.
Ed. 3. 29.

Co. 1. 86.
Perk. sect.
118. Co. 4.
221. Dier 6.

A rent, or any such like thing may be granted on condition, that * if such a thing be or be not done, the rent shall cease for a time, and then revive again; and this condition is good. But in case of land it is otherwise; for that cannot be granted after this manner. Also a condition to make an estate void for a part of the time is not good. And therefore if a feoffment be on condition, that upon such a contingent the feoffor shall enter, and have the land for a time, or the estate shall be void for a part of the time; or make a lease for ten years, provided that

* P. 127.

(c) So rents, conditions, warranties, and such like *inheritances executory*, may be defeated by defeasance made either at the time they are created, or at any time after—and so the law is of statutes, recognizances, and other things executory; Co. Lit. 237 a. And leases for years being mere chattel interests, they may be defeasanced by a condition after they are granted. This is important with licence to granting a licence to assign, in cases where the lessor's licence is made necessary to an assignment by the lessee. The licence, as we have seen in a former note (p. 123, note (q)), is a complete dispensation with the condition; and according to *Dumport's case*, (41 Rep. 119.) if the condition consists of different parts, as to re-enter for assigning without licence, for non-performance of covenants, payment of rent, &c. a dispensation with one part of the condition will be a dispensation with the whole; a doctrine which renders it very important, that where a licence to assign or underlet is granted, the condition should be revived: So in cases where it is intended to release or dispense with part of the condition and not the whole, there the condition should be revived as to those parts which are not intended to be released. The doctrine however that a licence to assign is a dispensation with the condition, appears to be of very questionable nature, or rather perhaps obviously an error. The language of such a condition usually is, that if the lessee, his executors, administrators or assigns, (by assigns is to be understood assignees with licence) shall assign without the licence of the lessor, or shall not pay the rent and perform the covenants, that the lessor shall have the power to enter. Now giving a licence to assign is not releasing or dispensing with that part of the condition which requires the licence, but quite the reverse; for the giving of the licence shows that there was intention to dispense with any part of the condition, but rather to maintain it. It appears therefore that the giving a licence (which is agreeable to the condition) can be no dispensation with the condition, nor can it authorize the assignee to make an assignment without a further licence, and consequently there can be no necessity to do any act to revive the condition; for in fact it still remains in full force. Till however this opinion should receive a judicial recognition, the Editor recommends that the usual practice should be followed, namely, an instrument between the lessor and assignee for the purpose of reviving the supposed extinct condition.

upon such a contingent it shall be void for five years; these conditions are not good. And yet if a feoffment be made, of two acres, provided that upon such a contingent the estate shall be void as to one acre only; this is a good condition.

A condition that a stranger, or the heir of the feoffor, shall do an act, is good: as if a feoffment be made to *I. S.* on condition that *I. D.* shall pay to the feoffor ten pounds at Easter next; or if a feoffment be made on condition that if the heir of the feoffor pay twenty shillings to the feoffee, that the feoffor and his heirs shall re-enter. But a condition to give a stranger a re-entry is void so far forth. And therefore if an estate be made upon condition, that upon such a contingent a stranger shall enter, or the estate shall cease, and another shall have it; howsoever this may be so drawn, as it may be a good condition to give him, his heirs, &c. that doth make the estate, an entry, yet it cannot be good to give the estate, or the entry, to the stranger. So if a feoffment be made on condition that upon such a contingent the feoffor and a stranger shall enter; this is not good to give an entry to the stranger, but it is good to give the feoffor a re-entry. And yet by will a man may devise a term after this manner.

Co. super Lit. 314. Dert. & Stud. 94. 159. 100. Co. super Lit. 379. Co. 1. 84. Dier 32. 21 H. 7. 11. Dier 4. Co. 8. 95.

If a man infeoff another, upon condition that he and his heirs shall render to a stranger and his heirs a yearly rent of twenty shillings, &c. and if he fail of payment thereof, that the feoffor shall re-enter; albeit this as a reservation of rent is merely void, and the condition that doth call it a rent, is merely mistaken, yet the condition is good, and *ut res valeat* the words shall be taken contrary to their proper sense (*f*).

Co. super Lit. 213.

If I infeoff *I. S.* of land on condition that if *I. D.* give to him ten pounds, or go to *Rome* before such a day, &c. that then the feoffee shall pay to me ten pounds, &c. this is a good condition.

Perk. sect. 798.

If a feoffment be made to one and his heirs, on condition that if the feoffee pay to the feoffor ten pounds, he shall have the fee of the land; this is not a good condition (*g*). But if he say further, and if fail to pay that, the feoffor shall re-enter, this is good (*h*).

Co. super Lit. 307.

If a gift in tail be made to a man and the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter; this is a void condition, for when the issues fail, the estate is at an end.

Co. super Lit. 224.

P. 128.

Conditions that are so penned, as they are insensible and altogether incertain, are void: as if one make a lease

Muddy and Gardner's

(*f*) A rent, properly speaking, cannot be reserved to a stranger; (Co. Litt. 143 b.) and therefore case like the above it is presumed the party entitled to the rent could have no legal remedy for recovery of it by distress, either at the common law or by virtue of any statutory provision for recovery of rent; consequently where such a payment as the above is reserved to a stranger, a remedy of distress should be given for recovery of it, otherwise it is apprehended the party would have a remedy for the recovery of it except in equity.

(*g*) The feoffee taking the fee by virtue of the grant to him and his heirs the estate is incapable enlargement upon condition; and consequently the words, that he shall have the fee upon condition paying £10, are nugatory.

(*h*) The feoffee taking a fee simple by the former words, these words make a condition in substance of his estate, and if he did not pay the £10 the feoffor would have a right to re-enter.

Adjudged Pas-
che, 14 Jac.
B. R. Co. 6.
41.

Co. 8. 75.
Plow. 477.
461. Lit. sect.
350. Perk.
sect. 710.
Plow. 135.
10 Am. pl. 15.
Perk. sect.
745. 707. Plow.
23. Lit. sect.
707. 350. Plow.
272. 482. 483.
4 H. 7. 4. See
more in the
Lord Stafford's
case, Co. 2.
73.

on condition that if the rent be behind to restrain, and if there be not sufficient, the ground to enter into the premises; this condition is void for insensibility, and the estate is absolute. *Et sic de similibus.*

A condition to enlarge or increase an estate may be good, as if a gift be made in tail, or a lease be made for life, or years, on condition that if such an act be done, or not done, the lessee shall have the land to him and his heirs, as if one make a lease for life to one, and if the lessor die without heir of his body, then he doth grant the land to the lessee and his heirs for ever (i). Or if land be granted to a man for five years, on condition that if the grantee pay to the grantor within the two first years ten pounds, then that he shall have the fee-simple, otherwise that he shall have the land but for five years, and livery of seisin be made according to the deed; this is a good condition, and by this upon the performance of the condition the fee-simple will pass. So if one grant land for five years rendering rent, and that if the lessee will hold it over to him and his heirs, that he shall pay twenty pounds rent; this is a good condition, and if he pay the rent, he shall have the fee-simple. So if a man make a lease for years, and at the same time, for the surety of the term to the lessee, makes a feoffment to him, upon condition that if he be disturbed in his term, he shall have the fee-simple of the land, and deliver both these deeds at one time, and give livery of seisin accordingly; this is a good condition. So if a lease for life be made upon condition, that if the lessor or his heirs, pay to B. or his heirs, ten pounds at a certain day, that then the lessor may re-enter, and if he do not pay it at that time, and the lessee pay to the lessor or his heirs ten pounds at a certain day, after the former day, that then the lessee shall have the land to him and his heirs for ever; this is a good condition. But in all cases where these kind of conditions are good to make the increased estate good, there must be these things in the case. 1. There must be a precedent particular estate, as an estate in tail, for life, or years, for a foundation to erect the subsequent estate upon, and that first estate also must be certain and irrevocable, not upon contingency, or with power of revocation. 2. The privy must remain until the time of the performance of the condition, for if the donee or lessee do grant away the first estate, the condition cannot afterwards be performed, to effect and produce the increasing estate. 3. The subsequent estate must vest *eo instanti*, when the contingency upon which the condition dependeth, shall happen, or never. 4. The first and second estate must take effect by one and the same deed, or else by two deeds delivered at the same time, for *quæ incontinenti fiunt esse videntur*. 5. The condition upon which the increase is, must * be possible and lawful, for upon an impossible

To enlarge an estate.

* P. 129.

And such a grant will be good, as well of things which lie in grant, as of things which lie in reversion, and may be annexed as well to an estate tail, which cannot be drowned, as to an estate for years which may be merged by the access of a greater estate. *Ferne on Cont. Rem. 203.*

condition

condition it cannot, and upon an unlawful condition it shall not, increase (k).

- If one make a lease for life, provided that if the lessee die within sixty years, that his executors shall have the land for so many of the sixty years as shall be to come at the time of his death; this is no good condition to make the estate to increase, but it may be a covenant. And if a lease for years be made, on condition that if the lessor sell the reversion of the same land, the lessee shall have the fee of it; this is no good condition to increase the estate. And a possibility cannot increase upon a possibility, as a lease for years to a lease for life, by one contingent, and the lease for life to a fee-simple, by another. And if a lease be made to a man and a woman for their lives, on condition that which of them two shall first marry, that one shall have the fee, and they intermarry; in this case neither of them shall have the fee for incertainty.
- Covenant.** Co. 1. 155. Dier 150. Co. 1. 94. Co. 8. 75. Co. super Lit. 218.
- To abridge an estate.** If a man make a lease for life, and add this condition, that if the lessee within one year do not pay twenty shillings, that he shall have but a term of two years, and he do not pay the twenty shillings by this his lease for life is gone, and he hath now but a lease for two years. Co. super Lit. 218. 50 Ed. 3. 37.
- 2. For the matter and substance of it.** If a lease be made, on condition that if a stranger dislike it, or be discontented with it, that the lease shall be void; this is a good condition. 1 H. 8. 13.
- If a lease be made, on condition that if a lessee be outlawed, the lease shall be void; it seems this is a good condition. Hil. 6 Ja. B. R. Curia.
- Prerogative.** If a feoffment be made, on condition that if the feoffee commit treason, that the feoffor shall re-enter; in this case the condition is vain, for if the feoffor enter, his entry is not lawful, for the King is entitled, and his title shall be preferred. Trin. 3 E. 6. per Curiam.
- Testament. Use.** No condition or limitation, be it by act executed, limitation of a use, or by devise, or last will, that doth contain in it matter repugnant, and tending to the utter subversion of the estate, or matter that is against law, or matter that is impossible to be done, is good. And therefore in all such cases if the condition be subsequent, the estate is absolute, and the condition void: And if the condition be to go before the estate, the estate and the condition both are void. Co. 1. 83. 6. 43. Co. 9. 12.
- Repugnant conditions. To restrain alienation.** If a feoffment or other conveyance be made of land, or a grant of rent, &c. in fee-simple, by deed or will, upon condition that the feoffee or grantee shall not alien to certain persons, as to I. S. or to I. S. and W. S. this is a good condition (l). So if one make a feoffment in fee of land, Co. super Lit. 223.

(k) Conditions against law are reducible under the three following heads, viz. 1st. to do something that is *malum in se*, or *malum prohibitum*; 2d. to omit doing something that is a duty; and 3d. to encourage such crimes or omissions. See 1 P. W. 189. There are certain things, which though they do not fall strictly under any of the above heads, yet they are considered as contrary to the policy of law and therefore bad:—such as bonds or agreements in restraint of trade generally, or in restraint of any particular place where the party receives no consideration for subjecting himself to such restraint; bonds or agreements entered into for bringing about marriage, &c. A condition to enlarge or defeat an estate given in furtherance of such objects would be bad if it is conceived. And ever a condition annexed to an estate at common law would be void on the ground of its being unlawful, it would be equally void if it was annexed to an estate operating under the statute of Uses.

(l) And the grantee may be also restrained from alienating for a particular time. *Large's* 1 Leon. 82. and 3 Leon. 182.

on condition that the feoffee shall not alien it in mortmain; this is a good condition (m). So if A. be seised in fee of black acre, and B. doth infeoff A. of white acre in fee, on condition that he shall not alien black acre; this is a good condition (n). But if the condition be that the feoffee or grantee shall not alien the thing granted to any person whatsoever, or that if he do alien to any person, that he shall pay a fine to the feoffor; these conditions are void in * the case of a common person as repugnant to the estate (o). But in case of the King, such conditions are good. And in the cases of a common person also the alienation is good until it be avoided by the feoffor. And in *Pasc. 19 Jac. B. R.* it was held by Just. *Dodridge* and *Chamberlain*, that if a feoffment be on condition that if the feoffee alien, he shall pay ten pounds to the feoffor, that this is a good condition: but Ch. Just. and Just. *Haughton* held the contrary, for then this shall be a circumvention of the law. If a gift had been made to an Abbot, and his successors, on condition not to alien, this had been a good condition.

• P. 130.

Prerogative.

Bragg and
Tanner's case.Doct. & Stud.
194.Co. super Lit.
234. 10 H. 7.
11. 13 H. 7.
23. Co. 10.
30. Perk.
sect. 739.
21 H. 6. 33.

If one make a feoffment of land to an infant, on condition he shall not alien to any person; this is a good condition during the minority of the infant, but not afterwards. In like manner as if one make a feoffment to a husband and wife, on condition they shall not alien; this condition to some intent is good, i. e. to restrain alienation by feoffment or deed, and to some intent repugnant and void, i. e. to restrain alienation by fine, for that is lawful (p). So if a gift be made in tail, on condition that the tenant in tail may alien for the profit of his issues; this is a good condition. And so if land be given in tail, upon condition that the tenant in tail or his heirs shall not alien in fee-simple, fee-tail, nor for the term of any other's life, but for their own lives; this condition is good. But if lands be given in tail on condition, that the tenant in tail, or his heirs in tail shall not suffer a common recovery, levy a fine with proclamations according to the statutes of 4 H. 7. and 32 H. 8. to bar the issues, or on condition that he shall not make copyhold estates of copyhold land, according to the custom of the place, or make leases according to the statute of 32 H. 8. ca. 28. these conditions

(m) Because such alienation is prohibited by law; and regularly whatever is prohibited by law may be prohibited by condition, be it *malum prohibitum* or *malum in se*. Co. Lit. 223 b.

(n) If this condition had amounted to a total restraint of the alienation of black acre it would have been bad; but as it does not do this, but merely occasions the loss of white acre as the penalty for alienating black acre, the condition is good.

(o) And the law is the same in a *devise* in fee, upon condition that the devisee shall not alien; as in the case of a *conveyance* whereby a fee simple passes. Co. Lit. 223 a.

(p) A condition annexed to an estate in fee to restrain alienation *generally* is repugnant to the nature of the estate, as it is contrary to the policy of the law to entirely restrain the alienation of such estate; but Lord Coke says, that although a condition repugnant to the nature of the estate is void, that a bond by which the obligor binds himself not to do that which the nature of his estate allows him to do, as a bond by feoffee not to alienate the estate. 1 Inst. 206 b. But *query* of this, and see *Jervis v. Breton*, 2 Vern. 251. Jenk. 120. *Freeman v. Freeman*, 2 Vern. 233. But though a condition restraining the alienation *generally* of an estate in fee-simple is bad, yet a condition annexed to the grant of an estate in fee-simple, restraining alienation to a particular person is good. See note (s), next page.

are held to be repugnant, and for that cause void (q). And yet see, for the last of these cases, the opinion in *Co. super Lit.* 223. to be contrary, and that a condition to restrain the making of such leases is good; for this power is not incident to the estate, but given to him collaterally by the statute, and *Quilibet potest renunciare juri pro se introducto*. But *tota curia* in *Mary Portington's* case is against him. If a man make a gift in tail to A. the remainder to him and his heirs, on condition that he shall not alien; this condition as to the estate tail is good (r), and void as to the other. And therefore if an alienation be, he shall defeat it only as to the estate tail. And if a man make a gift in tail, on condition that the donee or his heirs shall not alien; this is a good condition to some intents, and void to other, and therefore if he make a feoffment in fee, on any other estate by which the reversion is discontinued tortiously, the donor shall enter, otherwise if he suffer a common recovery. And a gift in tail, on condition that the tenant in tail shall not make a lease for his own life, is not a good condition, by *Co. 6. 43.* against *Co. super Lit.* 223. If one seised in fee of land, make a lease of it for years, or life, on condition that the lessee shall not alien the land leased, or any part thereof, during the term, or on * condition that he shall not alien it, or any part of it, during the term without licence of the lessor; these are good conditions. So if one be seised in fee of a manor, and he make a lease of years of it to T. S. on condition that he shall not make voluntary estates by copy; this is a good condition. But in a feoffment in fee such a condition is repugnant and void. And if one be possessed of a lease for years, or of a house, or of any other chattel real or personal, and he give or sell all his interest therein, upon condition that the donee or vendee shall not alien the same; this condition is void for repugnancy, and the gift or sale is absolute (s).

* P. 131.

If one make a feoffment of land in fee, on condition that the feoffor shall retain the land for twenty years without interruption; it seems this is a good condition and not repugnant.

If I grant land to another for life, if it shall please me so long to suffer him; it seems this condition is repugnant and void.

If a feoffment be made of land in fee, on condition that the feoffee shall not enjoy the land, or shall not take the profits of the land, or on condition that the heir of the feoffee shall not inherit the land, or on condition that the

(q) The power to suffer a recovery (or levy a fine according to the Statutes of Fines), cannot be strained by condition: 1 Burr. 84. And it was resolved in *Sunday's case*, 9 Co. 128. that no condition or limitation, be it by act executed or by limitation of any use, or by a devise in a last will, can be tenant in tail from aliening by a common recovery. See also *Foy v. Hinde*, Cro. Jac. 697. *King v. Burchall*, Amb. 379. and see *Fearne's Cont. Rem.* 6th ed. p. 257, et infra.

(r) Not good against alienation generally; for if an alienation was made by fine or recovery, the alienation would be good and the condition bad. See *supra*, last note (q).

(s) But if it were not to alien to a particular person it would be good, *Co. Lit.* 233 a. And in the case of a devise on condition that the devisee should not alien till he attained the age of thirty, the condition was held good, *Spittle v. Davis*, 2 Leon. 38. So a condition annexed to a devise that the devisees should not alien except to their brothers or sisters, was held good. *Doe v. Pearson*, 6 East's T. R. 173.

feoff

Perk. sect.
731.

feoffee shall not do waste, or on condition that his wife shall not be endowed; in all these, and the like cases, the condition is void as repugnant to the estate.

Co. 6. 41. 1.
84. super Lit.
224.

If a gift in tail be made, on condition that the donee or his issues shall not take the profits of the land, or on condition that if the donee die, his estate shall go unto another, or on condition that their wives shall not be endowed, or on condition that they shall not do waste, or on condition that warranty and assets, or a collateral warranty, shall not bar the issues in tail; all these conditions are repugnant and void.

Co. 1. 84.

If lands be given or granted to two and their heirs, on condition that the survivor shall have the whole notwithstanding partition, or on condition that the survivor shall not have the whole albeit there be no severance; these conditions are repugnant and void.

Perk. fol. 141.

If one make a lease for life, on condition that the lessee shall not do fealty; this condition is not good.

Co. super Lit.
304.

If lands be given to one and the heirs males of his body, provided that if he die without heirs females of his body, that the donor shall re-enter; this condition is repugnant and void.

Co. super Lit.
146. 10 H. 7.
6. Co. 6. 41.
5 H. 7. 7.
7 H. 6. 44.
Perk. sect.
732.

If one have land in possession, or reversion, and he grant a rent out of it, on condition that the grant shall not charge the person of the grantor; this is a good condition, and not repugnant. But if a man grant a bare annuity, or grant a rent charge out of another man's land with such a condition, or if one grant a rent charge, on condition that the grantee shall not distrain, nor charge the person of the grantor, or if one grant a rent out of land, on condition that the land shall not be charged with it; all these conditions are repugnant and void. So if two grant a rent charge out of land, provided * that it shall not extend to one of them; this condition is repugnant and void.

* P. 132.

Perk. sect.
733.

If a man seised in fee of land make a lease for years rendering rent, and after the lessee makes a lease to the lessor of other land, on condition that he shall not distrain for his rent in the former lease made to this lessee; this is a good condition, and not repugnant.

Perk. sect.
734. Dier 47.

If one make a feoffment in fee, or lease for life, with warranty, on condition that the feoffee or lessee shall not vouch to warrant, nor recover in value, or if the lease be made without impeachment of waste; on condition that if the lessee do waste the lessor shall re-enter; these are good conditions, and not repugnant (†).

Co. super Lit.
223. 224. 207.
Perk. sect.
723.

All conditions annexed to estates, being compulsory to compel a man to do any thing that is in its nature good or indifferent, or being restrictive to restrain or forbid the doing of any thing which in its nature is *malum in se*, as to kill a man, or the like, or *malum prohibitum*, being a thing forbidden by any statute, or the like, all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing

Conditions
against law.

†) See further as to repugnant or inconsistent conditions, *supra*, page 130, note (p), and see Vin. Condition (Z.). Bac. Abr. Condition (L.), and Com. Dig. Condition (D. 4.)

of some unlawful act, or to restrain or forbid a man the doing of his duty; the condition for the most part is void (u). And therefore if lands be given or granted to a man, upon condition that he shall kill a man, or upon condition that he shall burn his neighbour's house, or upon condition that he shall forswear himself, or upon condition that he shall save and keep harmless the grantor whatsoever he shall do, or that if he do not these things, the grant shall be void; this condition is void (v). Or if lands be given or granted to an officer, upon condition that he shall not duly execute his office; this condition is against law, and void: *Et sic de similibus*. So if a gift be made in tail, upon condition that the donee shall discontinue, or one give or grant land, on condition that the grantee shall be a forestaller against the statutes; these and such like conditions are void. And hereupon it is, that conditions annexed to land, that the profits thereof shall be employed to superstitious uses, are void. And hence also it is that such conditions as are against the liberty of law, as that a man shall not marry (x), or the like, are void.

Perk. sect.
727.

Co. 1. 24. 6. 43.

Dier 343. Ca.
super Lit. 306.

(u) If a man be bound upon condition that he shall kill *J. S.* the bond is void; but if a man makes a feoffment with a condition that unless the feoffee shall kill *J. S.* the feoffor shall re-enter; here the estate is absolute and the condition void. Co. Lit. 206 b. See also *Carpenter v. Beer*, Comberb. Rep. 246. But if the condition was a condition precedent, both the estate and the condition would be bad.

(v) Condition to do any thing which amounts to maintenance is void; as to save *A.* harmless from such appeal of robbery as *B.* hath against him; this condition is against law: 18 E. 4. 28. Rol. Abr. 417.

(x) A condition annexed to an estate tail that the tenant in tail shall not marry generally, is bad, for without marriage he cannot have an heir to his body. But such a condition annexed to the grant of an estate in fee-simple might be good, as a collateral heir to the grantee would inherit. Dyer 343 b. Jenk. 243. So a condition annexed to an estate tail, that the tenant in tail shall not marry a particular woman would be good.

The subject of conditions in restraint of marriage annexed to devises and legacies, is one of considerable importance. The ecclesiastical courts in conformity to the principles of the civil law, consider all conditions in restraint of marriage (as not to marry a particular person, or not to marry without consent, or till a certain age, &c.) to be contrary to the public good and therefore void. And in the case of legacies charged merely on personal estate where there is no limitation over on breach of the condition the Court of Chancery holds the same doctrine, and considers the condition merely in *terrorem*. See *Dailey v. Desbouverie*, 2 Atk. 261. *Elton v. Elton*, 3 Atk. 504. 1 Ves. 4. *Samphill v. Bailey*, Prec. in Cha. 562. *Jervis v. Duke*, 1 Vern. 20. *Pullen v. Ready*, 1 Wils. 21. *Harvey v. Aston*, 1 Atk. 361. *Reynish v. Martin*, 3 Atk. 330. *Maples v. Bainbridge*, 1 Madd. Rep. 590. And whether the condition is precedent or subsequent it will be equally void where the legacy is charged on a mere personal fund, and there is no bequest over on breach of the condition: see cases last cited. Where however the condition is precedent it may be of such a nature that the legacy cannot vest till a marriage takes place, but if one does take place, though without consent, the legacy will then vest; provided it is not given over on marrying without consent. See *Garbett v. Hilton*, 1 Atk. 380. *Hemmings v. Munkley*, 1 Bro. C. C. 303. *Elton v. Elton*, 1 Ves. 4. and 3 Atk. 504. *Pullen v. Ready*, 2 Atk. 590. But wherever the legacy is given over in the event of the condition being broken, there the condition will be good; and upon breach of it the legacy will belong to the person to whom it is given over. *Bellasis v. Ermine*, 1 Cha. Ca. 22. *Stratton v. Grimes*, 2 Vern. 357. *Aston v. Aston*, ib. 452. *Chamney v. Graydon*, 2 Atk. 616. *Wright v. Cameron*, 14 Ves. 389. *Lester v. Garland*, 15 Ves. 248. *Fitchett v. Adams*, 2 Stra. 1128. A general residuary bequest has been held to entitle the residuary legatee to a legacy which was given upon condition of marrying with consent. See *Amos v. Horner*, 1 Eq. Ca. Ab. 112. pl. 9. and see also *Scott v. Tyler*, 2 Bro. Cha. Ca. 431. [Though query of the soundness of this doctrine, as it is conceived that a residuary bequest affords no distinct evidence that the condition was meant to be any thing more than in *terrorem*.] But even where a legacy is expressly given over upon non-compliance with the condition, courts of equity lean as much possible in favour of the legatee and against the limitation over. Thus in the case of *Dailey v. Desbouverie*, 2 Atk. 260. where the trustees agreed to give their consent upon a proper settlement being made; and though the marriage was afterwards solemnized without any settlement being made, yet as a settlement was afterwards made, their conditional consent was held to be sufficient. In the case of *Burletan v. Humphria*,

Co. 11. 53.
7 Ed. 3. 63.
Perk. sect.
722. 725.

void. And hence also such as are against the public good. And therefore it seems if one grant his land to I. S. on condition that he (being a husbandman) shall not sow his arable land; this condition is void. And in all these cases if the condition be subsequent to the estate, the condition only is void, and the estate good and absolute; if the condition be precedent, the condition and estate both are void, for an estate can neither commence nor increase upon an unlawful condition (y).

* Co. 6. 41.
super Lit. 207.
219. 306.
Der 252. 262.
Plow. 152.
Perk. sect.
335. 729.
Plow. 272.
386. Co. 1. 84.
super Lit. 207.

* All conditions annexed to estates, that contain in them matter at the time of making of them impossible to be done, are void. And therefore if one give or grant land, on condition that a man shall go to *Rome* in three days, or on condition that a man shall infeoff* a corporation, when there is none such; or if one give lands in tail, on condition that the estate shall cease, as if the tenant in tail be dead (x); or if one grant lands, on condition that a man shall infeoff his wife; all these and such like conditions are void. And in these cases also if the condition be subsequent, the condition is void only, and the estate is absolute; and if the condition be precedent, the condition and the estate both are void; for an estate can neither commence nor increase upon an impossible condition. And if the thing to be done by the condition be possible at the time of the making of the condition, and do afterwards by the act of God become impossible; the condition is become void, and the estate absolute (a); as if a feoffment be made,

Conditions impossible.

* P. 133.

Humphries, Amb. Rep. 256, the condition was, that if the party married without the consent of N. H. in writing, the estate should go over. She married without N. H.'s privity, but he expressed his approbation of the marriage as soon as he knew of it; and Lord *Hardwicke* held that this was sufficient. And when the major part of the persons whose consent was necessary, have given their consent, it has been deemed sufficient. *Wiseman v. Forster*, 2 Cha. Rep. 23. *Harvey v. Anton*, 1 Atk. 375. And where a guardian has once given an implied consent by encouraging the addressee made to his ward, this has been held sufficient, although he afterwards, without sufficient reason, refused his formal consent. *Campbell v. Lord Neterville*, 2 Ves. 554, and see *Lord Strange v. Smith*, Amb. 263. So a general permission on the part of a trustee, that the legatee after she had attained twenty-one might marry whom she chose, was held sufficient to entitle the legatee to her legacy, although she married without the trustees knowledge. The marriage however had the subsequent approbation of the trustee, which might probably have some weight with the Court. See *Pallock v. Craft*, 1 Meriv. 181.

(y) Amongst unlawful conditions may be mentioned conditions to bonds, given upon presentment to a church living, for the general resignation of such living upon the request of the patron. See *Fytche v. The Bishop of London*, 2 Bro. Parl. Cas. 311. A bond however, with a condition to resign upon the patron's non coming of canonical age is good. See *Partridge v. Whiston*, 4 Term Rep. 359.

(z) The estate does not cease upon the death of tenant in tail, but upon his death without issue.

(a) As where one devised to his eldest daughter on condition she should marry his nephew at or before the age of 21. The nephew died young, and without the daughter having ever been required to marry him; and it was held that the performance of the condition having become impossible by the act of God the estate remained absolute. See *Thomas v. Howell*, 1 Salk. 170. But where such a condition precedent and the performance of it becomes impossible by the act of God, the estate will never vest, as where the condition was, that in case the Duke of *Southampton* married the daughter of Sir *Henry Ford*, and they had issue male, then that the trustees should stand seised to the use of the Duke during his life. The marriage took effect but the Duchess died without issue; and it was held that the Duke was not entitled to a life estate. See *Show*, P. C. 83. and see also *Mansell v. Mansell*, cited 2 Bro. Ch. Ca. 23. The performance however of even a condition precedent may, from the happening of some subsequent event be sometimes dispensed with; as where a person devised to trustees upon trust for his daughter A. in her marriage, and in case she married with the consent of the trustees, then to her and her heirs; but in case she should marry without their consent then to her sisters equally between them. Afterwards A. married in her father's life-time and with his consent and approbation: He afterwards died without

made, on condition that the feoffee shall before Easter following infeoff the feoffor, and the feoffee die before the day; or on condition that the feoffee shall appear in such a court before or at Easter, and he die before the time; in these cases the condition is gone, and the estate is absolute (b).

Limitation.

And the same law is for the most part of limitations, if they be repugnant, impossible, or against law, as is before shewed to be of conditions. See more in the next division following.

Co. 6. 41. 1. 84.

a. How a condition in deed or a limitation shall be taken and expounded. And how it must and ought to be performed.
1. In respect of persons.

It is a general rule, that such conditions annexed to estates as go in defeasance, and tend to the destruction of the estate, being odious to the law, are taken strictly, and shall not be extended beyond their words, unless it be in some special cases. And therefore if a lease be made, on condition that if such a thing be not done, the lessor [without any words of heirs, executors, &c.] shall re-enter and avoid it; in this case regularly the heir, executor, &c. shall not take advantage of this condition. So if one make a lease for years of a house, on condition that if the lessor shall be minded to dwell in the house, and shall give notice to the lessee, that he shall depart; in this case if the lessor die, his heir, executor, &c. shall not have the like advantage and power as the lessor himself, for the condition shall not be extended to them. And hence it is, that if a lease for years be made, on condition that the lessee shall not alien without the licence of the lessor; in this case the restraint shall continue only during the lives of the lessor and lessee and no longer. And yet this rule hath an exception; for if a man mortgage his land to W. upon condition that if the mortgagor and I. S. pay 20s. such a day to the mortgagee, that then he shall re-enter, and the mortgagor die before the day; in this case I. S. may pay the money and perform the condition. But other-

Co. 8. 90. *super Lit.* 219. 27 H. 8. 14.

Not to alien.

Dier 66.

Co. *super Lit.* 219.

To pay money.

without having altered his will; and it was held by Lord Chancellor Cowper, that by the marriage with the consent of the father the condition was dispensed with, and that the daughter was entitled. *Clark v. Lucy*, 5 Vin. Ab. 88. 2 Eq. Ab. 213. The performance of a condition may be excused by the default or refusal of the person whose concurrence is necessary to the performance of it. As where a person devised all his lands to one Comyns, in trust for his grand-daughter and the heirs of her body, with remainder to Comyns and his heirs, upon condition that he should marry the testator's grand-daughter: Comyns offered to marry the lady, but she refused, and soon after married another person; and Lord Talbot was of opinion that this was a condition subsequent and was dispensed with by the lady's refusal. *Robinson v. Comyns*, Forr. 164.

If a condition consists of two parts, one of which was impossible to be performed when the condition was created, yet the other must be performed; and the performance of the part which is possible will be sufficient.

Where a condition consists of two parts, in the disjunctive, the party has an election which of them to perform; and if both are possible at the time of creating the condition but one of them afterwards becomes impossible by the act of God, this shall excuse the performance of that which remains possible; for otherwise the election would be taken away by the act of God. *Laughter's case*, 5 Rep. 21. b. In a subsequent case however it was said that the rule and reason in *Laughter's case*, ought not to be taken so largely as Coke has reported, but according to the nature of the case. 1 Ld. Raym. 279.

(b) When a condition consists of two parts in the disjunctive, and both are possible at the time of making the condition, and afterwards one of them becomes impossible by the act of God, a performance of the other is not compellable. 5 Co. 22 a. 3 Mod. 233. but see last note, and see also further as to conditions impossible in Vin. Abr. Condition (C. a.) Bac. Abr. Condition (M.) Com. Dig. Condition (D.) In some cases however, conditions which become impossible by the act of God, though excused at law will nevertheless be enforced in equity. See *Holtham v. Ryland*, 1 Eq. Ca. Ab. 18.

W150

Lit. sect. 352.
Co. super Lit.
219. Co. 8.
60.

wise it is while the mortgagor doth live, for in that time *I. S.* alone without him may not tender it, and if he do, this tender is no performance of the condition. And in case where a condition doth tend to create an estate, there it shall have the most favourable exposition that may be; and therefore in that case albeit the words be not satisfied, yet * if the intent be satisfied, it sufficeth (c). And therefore if one make a feoffment in fee, on condition that the feoffee shall make an estate back again in tail to the feoffor and his wife before such a day, and before that day the feoffor die; in this case the condition shall be performed as near to the intent as may be; and therefore if the condition be, that he shall make the estate to them two, *habendum* to them and the heirs of their two bodies engendered, the remainder to the right heirs of the feoffor, the estate shall be made to the wife for life without impeachment of waste, the remainder to the heirs of the body of the husband begotten on the wife. And if *A.* infeoff *B.* on condition that *B.* shall make an estate in frankmarriage to *C.* with such a one the daughter of the feoffor; in this case albeit an estate in frankmarriage may not be made, yet an estate shall be made to them for, their lives (d). *Et sic de similibus. Conditio beneficiæ, quæ statum construit, benigne secundum verborum intentionem est interpretanda; odiosa autem, quæ statum destruit, stricte secundum verborum proprietatem est accipienda.*

* P. 134.
To make an estate.

Co. super Lit.
209. 208. 219.
Co. 2. 79. 6.
31. Lit. 353.
Plow. 50.
Perk. sect. 155.
779. 794. 787.
793. 789. 788.
38 Ed. 3. 11.
Dier 311.

In all cases where a time is set, for the doing or performance of the matter contained in the condition, be it to pay money, make an estate, or the like, it must be done at the time agreed upon, and set down in the condition (e). And in cases where it is to be done before a time certain, it must be done before that time, or else the condition is broken. But in all cases where no time is set for the doing of the thing contained in the condition, be it to pay money, make an estate, or the like, if the act to be done, be to be done to the party that doth make the estate, or be to be done to him and a stranger, and be such a thing as is for the benefit of him that doth make the estate, and for his benefit only, there regularly the party that is to do the thing shall have time to do it during his life, unless the party, feoffor, &c. that doth make the first estate, whereunto the condition is annexed, doth hasten the doing thereof by request; for if he request the doing thereof

2. In respect of time.

(c) See accordingly, 10 Mod. 420. It is a general rule that every person interested either in the condition (unless where it is evidently meant to be personal to some particular individual), or in the land to which it relates may perform it; as if a feoffee upon condition to pay £20 at Michaelmas infeoffs another person before Michaelmas; the second feoffee may perform the condition: Litt. 336. And where a time is appointed for the performance of a condition, the right to perform it will descend to the heir, notwithstanding the performance of it appears to be personal to some particular individual. Thus if a feoffment be made in mortgage upon condition that if the feoffor (without mentioning his heir) shall pay a certain sum on a certain day, then that he the feoffee should reconvey; here although the feoffor should die before the day of payment yet his heir may perform the condition. *Marks v. Marks*, 1 Eq. Ab. 106.

(d) See further how a condition shall be construed, Com. Dig. Chancery (S Q.) and by whom and to whom a condition is to be performed. Bac. Abr. Condition (F.) Vin. Abr. Condition (F. a.) (G. a.) Com. Dig. Condition (G.)

(e) If the condition be to pay money at such a day, it is sufficient if it be paid before the day, if the party accepts it, for that amounts to payment upon the day. Co. Lit. 218 b.

and

- and set no time, it must be done within a convenient time after that request; and if he request and prefix a time convenient when he doth desire to have it done, it must be done at that time, and in these cases the condition cannot be broken without a request, so long as he to whom the estate upon condition is made be living. And therefore in this case it is not like to a condition made by a will; for if one devise his land to *I. S.* so as he pay the twenty pounds to *I. D.* the testator doth own him, and no time is set for the payment thereof; in this case he must pay it as soon as it is demanded, or he doth forfeit the land, and the heir may enter. But if the thing to be done, be to be done to a stranger, and be for the profit and benefit of a stranger only; as if a feoffment be made, on condition that the feoffee shall marry the daughter of the feoffor (*f*), or on condition that the feoffee * shall infeoff a stranger, and no time is set for the doing hereof; in these cases the feoffee shall not have time during his life to do it, but he must do it in a reasonable time, and that without any request at all, or else he doth break the condition (*g*). And in some special cases when the act to be done is to be done to the party himself, the party shall not have time to do it during his life; as if one grant land to *I. S.* on condition that he shall grant an advowson to the grantor for his life; or on condition that he shall grant a rent charge to the grantor during his life, to be paid at Michaelmas and Lady-day; in these cases the grant of the advowson must be before the advowson fall, and the grant of the rent must be before either of the days of payment come, and that without request, else the condition is broken (*h*). And if the condition be that if *I. S.* do such an act, that then the feoffee shall pay ten pounds to the feoffor, else that the feoffor shall re-enter, and no time is set when the feoffee must pay this ten pounds; in this case it seems the payment must be as soon as the same act is done, and that without any request at all. And in case where the feoffee, &c. or a stranger, be to do an act, and he alone is to do it, and it doth nothing concern the feoffor, &c. as to go to *Rome*, or the like, there the feoffee, &c. or stranger shall have time during his life to do the thing, and it cannot be hastened by request.
- To pay money.** *I. S.* do such an act, that then the feoffee shall pay ten pounds to the feoffor, else that the feoffor shall re-enter, and no time is set when the feoffee must pay this ten pounds; in this case it seems the payment must be as soon as the same act is done, and that without any request at all. And in case where the feoffee, &c. or a stranger, be to do an act, and he alone is to do it, and it doth nothing concern the feoffor, &c. as to go to *Rome*, or the like, there the feoffee, &c. or stranger shall have time during his life to do the thing, and it cannot be hastened by request.
- To grant an advowson or a rent.**
- To marry *I. S.***
- * P. 135.**
- To infeoff.**
- To grant an advowson or a rent.**
- To pay money.**
- To make a lease.**
- If lands be granted, on condition that the grantee shall make a lease for life of other lands to the grantor, the remainder to a stranger; in this case the feoffee shall have all the time of his life to do it, if he be not hastened by request. But if the condition be to make a gift in tail to a stranger, the remainder to the feoffor; in this case it must be done in time convenient without request.

Perk. sect. 9.
798.

Co. super Lit.
209.

Co. super Lit.
220. 222.

(*f*) If the condition was subsequent, and she should refuse to marry the feoffee, he would be entitled to the estate notwithstanding the non-performance of the condition. See *Robertson v. Comyns* cited in note (a), page 133, supra.

(*g*) See accordingly Bac. Abr. Condition, pl. 26, and pl. 217.

(*h*) If a man grant an advowson upon condition that the grantee shall regrant the same to the grantor in tail, in this case if the church become void before the regrant, or before any request made by the grantor, he may take advantage of the condition, because the advowson is not in the same plight it was at the time of the grant. Co. Lit. 222 b.

If the king licence his tenant to infeoff *A.* and *B.* so as they give the land again to the feoffor, and the heirs males of his body, and he make a feoffment accordingly; in this case it must be re-conveyed before the death of the feoffor, or else the condition is broken.

Co. super Lit.
208.

If *A.* infeoff *B.* of black acre, on condition that if *C.* To infeoff.
infeoff *B.* of white acre *A.* shall re-enter; in this case *C.*
shall have time to do this during his life, if *B.* do not
hasten it by request.

Perk. sect.
795.

If a lessee grant his estate to a stranger, on condition To get the
that the grantee do get the good will of the lessor, and no good will of
time is set when he shall get his good will; it seems in this I. S.
case he shall have no time to get his good will during the
term, and that although he deny it at the first, yet if he
grant it afterwards that this is sufficient.

Lit. sect. 342.
Co. super Lit.
213.

When a time is set in certain for the payment of money,
or the doing of any other thing generally, neither agent
nor patient are bound to attend any other time. And if
the thing be to be done on a day certain, but no hour of
the day is set down wherein the * same shall be done; in
this case they must attend such a distance of time before
the sun set, as may be convenient to do that work in.
And if the condition be to pay money at a place certain,
at any time during life; in this case the money may not be
tendered at any time in the place, in the absence of him
that should receive it; but he that is to pay it must give
notice to the other party before hand, at what time he will
tender it, that the other may be ready to receive it. Or
if at any time the parties happen to meet at the place, a
payment or tender then at that place is sufficient (i). And
the same law is for the most part in conditions of obliga-
tions (k).

* P. 136.

To pay money.

Obligation.

Co. super Lit.
210. 211. 213.
Lit. sect. 343.
345. Bro.
Condition 60.

In cases where a place is set down for the doing of the
thing contained in the condition, there it must always be
done at that place, unless by some agreement made be-
tween the parties afterwards another place be appointed;
otherwise the condition is not performed, and the parties
are not bound to attend in any other place (l). But in
cases where there is no place set down for the doing of
the thing contained in the condition, if the thing to be
done be a corporal service, as to pay money, or any such
like thing, the party that is to do it must at his peril seek
out the person to whom it is to be done, if he be *infra*
regnum Angliæ; but if he be not within the kingdom, he
is not bound to seek him, and yet the condition is not
broken. And if the thing to be done be either local, i. e.
such a thing as must be done in or at a place certain, as
the making of a feoffment of land, payment of rent, or
the like; in this case the thing must be done at that very
place, and a tender of doing it in that place is a suffi-
cient performance of the condition: as for example, if a

3. In respect
of places.

To pay money.

(i) See more fully as to the time of performance of a condition, Vin. Abr. Condition from (C. b.)
(M. b.) Com. Dig. Condition (G. 3.) Bac. Abr. Condition (P. 3.)

(k) See the chapter on Obligations.

(l) But if the person to whom the condition is to be performed, is willing to accept the performance
at another place, the performance will be good.

feoffment

feoffment be made, on condition that the feoffee shall pay to the feoffor twenty pounds on Easter-day at *Dale*, and the feoffee tender the twenty pounds the same day at *Sale*; and albeit the feoffor be at *Sale*, and he tender the twenty pounds to his person there the same day, yet this is no performance of the condition. And if a feoffment be made in mortgage, on condition for the payment of money at a day, and no place is set for the payment thereof; in this case the mortgagor must seek the mortgagee and tender it to his person at his peril; and tender of the money upon the land mortgaged, is not a sufficient performance of the condition (m). And if a feoffment be made, on condition that the feoffee shall infeoff the feoffor of white acre in *Dale*; in this case, the feoffment, or the tender of it must be in *Dale*, and cannot be elsewhere, and a tender of it there is sufficient to perform the condition. So if the condition be, that the feoffee shall in Easter term next acknowledge satisfaction upon a judgment in the *King's Bench*; this must be done there, and cannot be done elsewhere. So if a feoffment in fee be made of white acre, rendering rent to the feoffor and his heirs, on condition that if the rent be not paid, the feoffment to be void, and * no place is set for the payment of it; in this case the feoffee is not bound to tender his rent any where for the saving of the condition, but upon the land, and a tender there is sufficient. And if a man make

To infeoff.

To acknowledge satisfaction.

* P. 137.

To pay money.

(m) The mortgagor, in order to perform the condition and make a sufficient tender, must be attentive likewise to the time and manner of making his tender: as to the *time*, if the payment is mentioned to be made on a certain day but without naming any particular *hour*, any time before the last instant of the day is sufficient. Co. Lit. 202 a; and see also Com. Dig. Condition (G. 8.) With respect to the *manner* of making a legal and sufficient tender of the mortgage money, if the condition be (as it usually is) to pay *lawful money of Great Britain*, that is to be understood money coined by the King's authority, or foreign coin by proclamation made current within the realm. Co. Lit. 207 a. 5 Co. 114 b. And though it may be very inconvenient to a mortgagor to procure the whole sum in cash, yet he is to consider that Bank notes are not strictly a legal tender, unless offered to be turned into money. Eq. Ca. Ab. Mortgages (D.) pl. 9. Vin. Ab. Tender (B.) and see *Grigby v. Oakes*, 2 Bos. & Pul. 526. But where a tender is made in notes, and the tender is not objected on the ground of its being made in notes such tender would be considered as good. *Wright v. Reed*, 3 Term Rep. 554. And query, whether a Court of Equity would not consider a tender in bank notes during the suspension of cash payments a sufficient tender. See 2 Scho. & Lef. 534. The mortgagor may bring the money in purses or bags without shewing or telling it; it being incumbent on the mortgagee to put it out and tell it. It also behoves the mortgagee to inspect the goodness of the money; for if there is any bad money in the bags and the mortgagee accepts it, the mortgagor is not bound to change it.—5 Co. 115. Co. Lit. 308 a. [but see *infra*, page 142, note (e)]. And see farther on the subject of tender, *Moffatt v. Parsons*, 5 Taunt. 307. *Robinson v. Cooke*, 6 Taunt. 336. *Reed v. Golding*, 2 Maul. & S. 86. *Betterbee v. Davis*, 5 Campb. 70. *Thomas v. Evans*, 10 East. T. R. 101. It may here be proper to notice, that by the act of the 52 Geo. 3. c. 50. (continued by the act 54 Geo. 3. c. 52. during the suspension of cash payments) it is enacted, that in all cases in which any sum of money is directed or adjudged to be paid under any rule, judgment, or decree of any court of law or equity, or is allowed to be paid into court in order to stay proceedings, or under any distress for rent, &c. in such cases the payment in notes of the Bank of England, if the payment is made in *Great Britain*, and in notes of the Bank of Ireland, if the payment is made in *Ireland*, shall be deemed good payments in law; and in all cases in which any money is payable out of any such court, payment in Bank of England notes, in *Great Britain*, and in Bank of Ireland notes, in *Ireland*, shall be good payments in law; so that the above acts go nearly the length of making notes of the Bank of England (in *England*), and of the Bank of Ireland (in *Ireland*), legal tenders during the continuance of the suspension of cash payments. By the act however of the 59 Geo. 3. c. 49. (which continues the acts for suspending cash payments till the first day of May, 1823,) the holders of Bank of England notes to the value of six ounces of gold, (calculating the value of such gold between different periods after certain different rates,) may require payment in gold; but the bank is not to be compelled to pay gold except in ingots or bars of sixty ounces; so that although gold may be obtained for notes of the value of sixty ounces of gold, yet it cannot be obtained for any further sum of less than the same amount.

a feoffment

a feoffment in fee, without any reservation of rent precedent in the deed, on condition that the feoffee and his heirs shall render a yearly rent of twenty shillings a-year to the feoffor and his heirs, and if they fail, that the feoffor shall re-enter; in this case also it seems the payment or tender must be upon the land. But if the condition be, that he shall render twenty shillings a-year to a stranger, and his heirs; this is no rent, nor in the nature of a rent, and therefore in this case the feoffee must tender it to the person of the stranger where he can find him at the day, or else he doth break the condition, and tender upon the ground is not sufficient. But in these cases if the nature of the thing to be done be such as will not admit of such a carriage from place to place, to seek out the person of the feoffor, &c. there albeit the thing to be done be corporal or transient, and not a local thing, yet he that is to do it shall not be bound to seek out the person of the other; as for example, if an estate be made, on condition that the grantee shall deliver twenty quarters of wheat, or twenty loads of wood, to the grantor at such a time, and no place is set for the doing thereof; in this case the grantee is not bound to carry the same about to seek the feoffor or grantor, as he is bound to carry money; but before the day, the grantee is to know of the grantor where he will appoint to receive it, and there it must be tendered. And the like law is for the most part in conditions of obligations.

To deliver
wood or corn.

Obligation.

A caveat.

It is best therefore in all these cases, and herein he that is to be the agent is to take care to have certainty of time and place set down in the condition for the doing of the thing that is to be done, and the more certain it is, the better it is for him (n).

Per Justice
Bridgman.

If a lease be made, on condition that the lessee shall pay to the lessor all such sums of money as the lessor shall lay out in such a business; in this case, the lessor must first tender to the lessee a note of the charges, before the lessee is bound to pay; and until this be done, the condition cannot be broken. And after a note is given also, he shall have some reasonable time to provide the money. And if he tender him a note of more than in truth he doth lay out, the lessee, if he know it, may pay so much as is laid out, and he may refuse to pay any more.

4. In respect
of other
matters.
To pay money.

§ 5. 22.

If lands be granted, upon condition that *A.* shall make an estate of lands at the charges of *B.* in this case *A.* must do the first act, viz. notify to *B.* what assurance he will make, before *B.* is bound to tender the charges (o).

To make an
estate.

See further as to the performance of a condition at a certain place, Bac. Abr. Condition (P. 4.)
Abr. Condition (U. b.) Com. Dig. Condition (G. 9.)

Wherever either by express stipulation or by necessary implication, a prior act is to be done on either side, the condition need not, in legal strictness, be performed till such prior act is performed. Thus where the condition of a bond was that *A.* and his wife should levy a fine to *B.*; *per C. J.* said, that *B.* was first bound to sue out a writ of covenant, otherwise there was no breach of the condition. *Wakond v. Hill*, Hut. 48. And see *Heard v. Wedham*, 2 East's T. R. 619.
St. Alban's v. Shore, 1 Hen. Bl. 270.

To deliver
household stuff,
or pay money.

If a feoffment be made, on condition that the feoffee shall give so much household stuff to the feoffor, or so much money for it as it shall be rated at by two indifferent persons to this end to be chosen; it seems in this case, the election of the two men must be by the feoffee: but if the words be by two persons to be indifferently chosen, then the election shall be by both parties, for in the first case the word indifferent doth go to the praising, not to the persons. Pasche 17.
Jac. B. R.

* P. 138.

To cleanse
ditches.

If a feoffment be made of a ground, on condition that the feoffee shall rake the ditches; in this case if the feoffee do it once, it is a sufficient performance of the condition. And yet if a man grant a house for life, on condition that the lessee shall dwell and be resident in the house during the said term; in this case it is not sufficient that he dwell in it once during the term, but must do so all the term, or else the condition is broken (p). 27 H. 8. 1.
Plow. Col-
thirst's case 21.

To dwell in
the house.

If an annuity be granted of ten marks *per annum* to a man, on condition, or till he be promoted to a benefice by the grantor, and it is not said of what value the benefice shall be; in this case it shall be taken for a benefice of as great value, and of as good an estate as the annuity is; otherwise the grantee may refuse it, and yet his annuity shall continue. Perk. sect.
804.

To give goods.

of as great value, and of as good an estate as the annuity is; otherwise the grantee may refuse it, and yet his annuity shall continue.

If a feoffment be made, on condition that the feoffee shall give all his goods *si quæ fuerint*, or give all his pikes in his pond *si quæ fuerint*; in this case the words shall be taken in the present tense, for the goods and pikes that are at the time of the grant. But if a feoffment be on condition that the feoffee shall give all his goods in *London si quæ fuerint*, that did belong to *I. S.* in this case the words shall be taken in the preter-perfect tense. Perk. sect.
742.

Not to disturb
the lessor in
taking the
wood.

If one make a lease of the manor of *Dale* (wherein is a wood called *Dale-wood*) excepting all the woods, and underwoods, growing in *Dale-wood*, and all the great trees growing elsewhere, and this is upon condition, that if the lessee shall disturb the lessor to cut and sell the wood and underwood excepted, the lease to be void; in this case it seems the condition shall extend only to the wood and underwood in *Dale-wood*, and not to the trees elsewhere: but if the words of the condition be [shall disturb, &c. to cut, &c. the wood and underwood on the premises] *contra*.

Haward &
Fulcher's case
Hil. 3 Car.
B. R.

To pay rent.

If one grant land rendering rent at the feasts of *St. Michael* and *Lady-day* or within a month after, on condition that if it be behind after the feasts and days limited by the space of eight weeks, that the lease shall be void; in this case the eight weeks shall be accounted from the month which is the twenty-eighth day after the feast.

If the condition be made in the copulative and consist of divers parts, every part must be observed, or the con- 12 H. 7. 10
Co. super
225.

(p) In the case of a condition of residence annexed to an *estate tail*, such condition may be good of by suffering a common recovery. Before there has been any breach of the condition; and such condition, if annexed to an estate in fee, would not, it is conceived, be good, unless its operation was confined to the period of lives in being and twenty-one years after.

Perk. sect.
146.
Dier 337. 372.

dition will not be performed (g). But when it is made in the disjunctive, if any part of it be observed it is a sufficient performance of the condition. And therefore if a feoffment be made, on condition to re-infeoff and pay twenty pounds, and the feoffee do re-infeoff but not pay the twenty pounds; in this case the condition is broken. But if the condition be to re-infeoff or pay twenty pounds, and the feoffee do one of them; it is a good performance of the condition (r). And when it is made in the copulative and disjunctive both, it shall be taken in the disjunctive only; as, if a lease for years be made to A. and B. his wife, on condition that the said A. and B. or any child between them shall so long live; this shall be taken in this sense if the husband, wife, or child shall so long live; so that the lease shall not be determined by the death of the husband and wife alone (s). If there be two provisos in two several indentures of conveyance of several manors to A. and B. that if the feoffor pay or tender twenty shillings to A. and B. or the heirs of A. that the conveyance shall be void; and A. die; in this case tender to B. is not sufficient, and it must be made to the heir of A. and it must be twenty shillings for every proviso: but otherwise it is of a collateral act.

* P. 139.

Co. 3. 64.
super Lit.
203, 204.
Dier 6. 127.
11 H. 7. 21.

If the words of a condition be thus, that upon such a contingent the party shall enter and retain the land until the thing be done, &c. in this case, and by these words, the estate is not determined; as it is by these words, [that the estate shall be void, or that the grantor shall re-enter, or the like]. And in these words there is a difference also to be observed; for if the words be, that upon such a contingent the estate shall cease and be void, and it be a lease for years to which the condition is annexed, the estate is *ipso facto* void without entry, or claim, and can never be affirmed afterwards; but if the words of the close of the condition be, that the feoffor, lessor, &c. shall re-enter, without any other words, albeit it be in a lease for years, yet the lease is not void until he hath made an actual re-entry. But in both cases if the estate to be avoided be an estate in fee, or for life, it is only voidable by the breach of the condition, and must be

(g) But if such condition copulative is impossible to be performed, it shall be taken in the disjunctive. Owen 52. As where the condition is, that he and his executors shall do such a thing: this is the disjunctive, because he cannot have an executor in his life-time. Roll. Abr. 444, ante 115. And where the literal performance of a condition becomes impossible by the happening of some subsequent event, there the condition must be performed as near to the intent as may be. See 1352. and see supra; page 133, notes (a) and (b), as to conditions which become impossible by the act of God.

(r) If A. obliges himself to pay to B. ten pounds, or so much as J. S. shall appoint; if J. S. will appoint any sum to be paid, A. shall pay the ten pounds. Lutw. 694. Where A. devised an estate to B. upon condition that he married with the consent of trustees or a woman of competent fortune. B. married a lady with a good fortune but without the consent of the trustees, and it was held, the condition was complied with. See *Long v. Dennis*, 4 Burr. Rep. 2052. and see supra, 132, note (x), relative to devises and bequests upon condition of marrying with consent of trustees or guardians. And what shall be deemed a condition in the disjunctive, how it shall be affirmed, and when the performance shall be excused, see in Com. Dig. Condition (K.) And see supra, page 133, latter part of note (a).

(s) See accordingly the case of *Baldwin and Cocks*, 1 Leon. 74. Owen 52. S. C.

made void by entry, or claim (t); and until this be done, the grantor can make no new estate of the land. But in the first case before, the party shall retain the land and take the profits of it in the nature of a pledge, until the thing be done agreed upon in the condition, and then the other party shall have the land again. See more in the next questions. And in *obligation*, numb. 7. *covenant*, numb. 6.

9. When and how a condition or limitation shall be said to be performed, or not.

1. When the act is to be done between the parties themselves. To make an estate.

* P. 140.

The words of a condition may be performed, and not the intent; and the intent may be performed, and not the words; and then for the most part a condition is performed when the intent and meaning of it is observed.

And therefore if a feoffment be made, on condition that the feoffee or his heirs shall make an estate to the feoffor and his wife in tail before such a day, and before the day the husband die, and then he make an estate as near it as he may, viz. to the wife for life without impeachment of waste, and after to the heirs of the body of the husband; this is a good * performance of the condition.

And if the condition be that the grantee shall make a feoffment of land; and he make a lease of the land first, and then a release to the lessee and his heirs; this is *tantamount* and a good performance of the condition (u).

To pay money.

If a feoffment be made, on condition that if the feoffor or his heirs pay ten pounds by a day, the feoffment to be void, and the feoffor before the day doth commit treason and is executed, and so dieth without heir; and after, before the day, the heir is restored, and he at the day doth pay the money; in this case this is a good performance, notwithstanding there was once a disability (x). So as if heretofore one had made a feoffment, on condition to re-infeoff by a day, and before the day the feoffee had entered into religion, and then had been de-arraigned, and at the day had made the feoffment; this had been a good performance of the condition.

By and to whom money shall be paid

If a feoffment be made, upon condition that if the feoffee shall pay to the feoffor ten pounds such a day, that then he shall have the land to him and his heirs,

Co. 8. 90. Lit. sect. 352. Co. 3. 64. 282. 2 H. 4. 11.

Co. super Lit. 207.

Co. super Lit. 222. Perk. sect. 802, 803.

Co. 5. 96. & super Lit. 208. 207.

(t) An entry or claim are necessary to avoid an estate of freehold created at the common law, because an estate created with the solemnity of livery can only be avoided by an act of equal notoriety. It is not however necessary that the entry should be made by the party entitled to enter, for entry by a stranger on his behalf, even without any authority for the purpose, is sufficient; provided the party entitled afterwards assents to it. *Fitchell v. Adams*, Str. 1126. In the case of advowsons, rents, commons, remainders, and reversions where no entry can be made, in these cases a claim must be made at the church or upon the land. If, however, the condition related to a chattel interest in things of the above nature, and such interest was by the terms of the condition made to cease upon any certain event, in that case no claim would be necessary: And if a person grants a rent charge out of his lands upon condition; upon a breach of the condition the rent charge will become extinct without any claim; for the grantor being the owner of the land out of which the rent issued need not make a claim upon his own land.

(u) If a man is bound in an obligation upon condition to infeoff J. S. and he makes a lease for years and release to him in fee, he has performed the condition, although not according to the strict letter. Plow. 7: But if the party in whose favor the condition was to be performed should expressly require a feoffment to be made, in that case the condition could not be considered as performed by a conveyance by lease and release; especially if the feoffment was required before the lease and release were made.

(x) See Mr. Sugden's Treatise on Powers, page 148, for cases where the crown can perform conditions vested in persons attainted of treason.

otherwise

otherwise that the feoffor shall re-enter; or if it be made upon a condition that the feoffee shall pay ten pounds to the feoffor such a day; and before the day the feoffee sell the land; in this case the seller, or the buyer either of them may tender the money at the day, and this will be a good performance of the condition; for he that hath interest in the land on the one side, or in the condition as party or privy on the other side, may tender and perform the condition to save the estate (y).

Lit. sect. 534. If lands be mortgaged, or (which is all one) if a feoffment be made of lands on condition that if the mortgagor or feoffor pay ten pounds to the feoffee such a day, that then the estate shall be void, and before the day the mortgagor or feoffor die; in this case the heir or executor of the feoffor, the ordinary, the guardian in chivalry or

(y) It is a rule of the common law that no one can take advantage of the breach of an *express* condition [in the case of conditional limitations the same strictness does not prevail] but parties and privies in right and representation; as heirs, executors, or administrators of natural persons, and the successors of bodies politic; so that neither privies nor assignees in law, as lords by escheat, nor privies in estate, as persons in remainder, can enter for a condition broken.

In the case however of conditions *implied or in law*, privies and assignees in law may enter for breach of them. Thus Lord Coke says, if a man makes a lease for life there is a condition in law annexed to it, that if the lessee creates a greater estate than for his own life the lessor may enter. Of this and the like conditions in law, not only the lessor and his heirs may take the benefit, but also his assignee, as the lord by escheat.

By the statute 32 Hen. 8. c. 34. it is enacted "that all persons and bodies politic, their heirs, successors, and assigns, which have or shall have, any gift or grant of the king of any lordships, manors, lands, &c. which did belong or appertain to any of the monasteries, &c. or which belonged to any other persons, &c. and also all other persons being grantees or assignees to the king, or to any other person or persons, and the heirs, executors, successors, and assigns of every of them, shall and may have the like advantage by entry for non-payment of rent for doing waste or other forfeiture; and the same remedy by action only for not performing, all conditions, covenants, and agreements contained in the said leases against the lessees or grantees, their executors, administrators, or assigns, as the lessors or grantors, their heirs or successors ought, should, or might have had at any time or times."

Lord Coke states the following judgment and reasonings made upon this statute. 1st. That the statute is general; viz. that the grantee of the reversion of every common person as well as of the king, shall take advantage of conditions. 2d. That this statute extends to grants made by the successors of the king, although the king is only named in the act. 3d. That where this statute speaks of lessees it does not extend to gifts in tail. 4th. That where the statute speaks of grantees and assignees of the reversion, an assignee of part of the estate in the reversion may take advantage of the condition; as where such reversion is granted for life or for years only, the grantee may take advantage of the condition. [But the grantee of a part of the reversion, (as of one acre of two) cannot take advantage of the condition. Co. Litt. 215. a.] 5th. If a lessor bargains and sells the reversion by a deed indented and enrolled, the bargainee is in the *per* by the bargainer, and yet he is an assignee within the statute. It is the same if the reversion is conveyed by grant; but those who come in by act in law, as lord by escheat, cannot take any benefit from this statute. 6th. Although the words of the statute are "for non-payment of rent, for doing of waste or other forfeiture," yet grantees or assignees shall not take the benefit of every forfeiture by force of a condition, but only of such conditions as either are incident to the reversion, as rent, or for the benefit of the estate, as for doing waste, for not keeping the houses in repair, &c; and not for the non-payment of a sum in fees or things of that nature. 1 Inst. 215. a. Where a condition to a lease was, that if the rent should be in arrear the lessee or his assigns (without naming heirs) should enter, and then the lessor granted the reversion and died, it was held that the above statute did not authorize the grantee of the reversion to enter after the grantor's death for want of the word *heirs*. See Co. Lit. (Mr. Thomas's ed.) p. 91. n. 130. It may here be proper to notice, that where the heir at law as such has a right of entry for condition broken, the heir at common law is the person who must enter. Thus if a condition to an estate held in gavelkind is broken, the heir at common law must enter for the breach; and after such entry all the younger sons shall enjoy the estate with him. And the entry must not be made by the heir at common law, but it must be made by the heir *ex parte paterna*: therefore if a person seized of lands in right of his mother makes a feoffment in fee of them upon condition and dies, and afterwards the condition is broken, the heir on the part of the father shall enter. For though the estate does not descend to him, yet the right of entry for the condition broken which was created by the feoffment and reserved to the feoffor and his heirs descended on him.

Testament.

or socage of the heir of the feoffor, or any other by either of their commandment precedent, or assent subsequent, may pay this money at the day, and payment or tender of it by either of them at the day is a good performance of the condition (x). † And so also it seems † Lit. sect. 125. the law upon a devise of land to *I. S.* paying to *I. D.* twenty pounds; if *I. S.* die, his heir or executor may pay the twenty pounds, and this is a good performance of the condition. But in these cases, if a stranger, of his own head without any such commandment or agreement, pay the ten pounds; this will be no good performance of the condition. And yet perhaps if the party that is to pay it be an idiot; the payment or tender by any one in his behalf shall be a good performance of the condition (a). And if a feoffment be made, on condition that if the feoffor pay ten pounds to the feoffee, that the estate shall be void, and no time is set for the payment of this money, and the feoffor die before any payment or tender made; in this case his heir cannot tender it and so perform the condition (b). Lit. sect. 387.

him. But when he has entered the heir on the part of the mother may enter upon him. Supposing, however the heir on the part of the father should refuse to enter, is the heir on the part of the mother to be without a remedy? See *infra*, page 150, note (r).

(x) Because they represent the person of their testator, &c. and have an interest in the land; and the feoffee has the same advantage if the payment be made by the heir, &c. as if it were by the feoffor himself, Co. Lit. 209.: But if the money is not paid at the day, whereby the condition is lost and the estate of the mortgagee becomes absolute at law, the mortgagor is allowed in equity to redeem on payment of the money due; and this is called his equity of redemption. In mortgages of estates belonging to married women where it is the intention that the equity of redemption should be limited to the husband, it is not sufficient merely to limit it to him by the deed, but it should be distinctly stated that it was the intention that it should be so limited, otherwise the wife will be considered as entitled to it, notwithstanding it should be limited to the husband. See *Jones v. Jackson*, 16 Ves. 356. In order however in such a case to guard the wife more effectually against fraud and imposition, it might be advisable that the wife should be separately examined by some respectable person as to her intention, and that such person should indorse a memorandum of such examination upon the mortgage deed, and attested under his hand. The doctrine of redemption of estates in mortgage is very important. The reader will find a full explanation of the nature of it, what persons are entitled to it, after what length of time, and in what manner, in *Bac. Abr. tit. Mortgage (E.)* Com. Dig. Chancery (4 A. 4.) Vin. Abr. Mortgage (Q.). And see too Mr. Powell's Treatise on Mortgages. Until the statute of 7 Geo. 2. c. 20, the mortgagor in case of non-payment according to the condition, had no relief except in a court of equity. That act recites, that in ejectments by mortgagees for the recovery of the mortgage lands and in actions on bonds given by mortgagors to pay the money, courts of law have not power to compel mortgagees to accept the principal and interest due to them and costs, or to stay mortgagees from proceeding to judgment in such actions; but mortgagors must have recourse to a court of equity, in which case courts of equity do not relieve till the hearing of the cause: For remedy thereof it is enacted, that in actions on bonds for payment of mortgage money, or in ejectments in any of the courts at Westminster, or sessions in *Hales*, or in the counties palatine of Chester, Lancaster, or Durham, for the recovery of mortgaged lands, when there is no suit depending in equity for foreclosing thereof, if the person having right to redeem, and who shall be defendant in such action, shall, at any time pending such action, pay the mortgagee, or, in case of his refusal, bring into court, all principal and interest due on the mortgage, and all costs, the monies paid to such mortgagee, or brought into court, shall be in full discharge of the mortgage, and the court may compel such mortgagor to re-convey the mortgage lands and deliver up all deeds relating to the title thereof. And it is enacted that in all suits in equity for foreclosure, courts of equity, upon application made by the defendant having a right to redeem, and upon admitting the plaintiff's right, may at any time before the cause be brought to a hearing, make such decree therein as they could have made in case such cause had been regularly brought to a hearing. See *supra*, page 136, note (m), and *infra*, page 140, note (d), relative to the payment of mortgage-money.

(a) If the heir be an idiot of what age soever, any man may make the tender for him in respect of his absolute disability; and the law in this case is grounded upon charity, and so in the case of infants, and in similar cases. Co. Lit. 206 a. Vin. Abr. Condition (K. a.) pl. 10.

(b) This it is presumed is only where the benefit of the condition is clearly intended to be personal to the feoffor.

Co. super Lit.
207. Bro. Con-
dition 109.

If a feoffment be made, on condition that if the feoffor and *I. S.* pay ten pounds such a day, the feoffment to be void, and the feoffor die before the day, and *I. S.* alone pay it; this is a good performance of the condition.

Co. super Lit.
210. 5. 96.
Dier 181. 101.
Co. 6. 69. Lit.
sect. 339.

If a feoffment be made, on condition that the feoffor pay to the feoffee or his heirs ten pounds such a day, and before the day, the feoffee doth grant the land away to another; in this case the money may be paid to the feoffee himself, or if he be dead to his heirs, and this payment is a good performance of the condition (c). And if the words of the condition be [that if he pay to the feoffee, his heirs or assigns, &c.] in this case, payment to either of them, is a good performance of the condition; so as if in this case the feoffee make a feoffment over, it is in the election of the first feoffor to pay the money to the first or second feoffee, and if the first feoffee die, to pay it to his heir or the second feoffee. But payment to an executor or administrator in this case is not a good performance. And yet if the words of the condition be, that if he pay to the feoffee [without the words *heirs, executors, &c.*] ten pounds such a day, in this case the payment may be made to the executor or administrator of the feoffee after his death, and such a payment is a sufficient performance of the condition: and if the words of the condition be [that if the feoffor pay to the feoffee, his heirs, executors or administrators, &c.] in this case payment to either of them, is a good performance of the condition (d). But payment to an assignee in this case is not good. And if the words be, that if he pay to the feoffee and his heirs, &c. in this case payment to his executors, or to his assigns is not a good performance of the condition. So that in all these cases, it seems that, as to the person to whom payment is to be made, the words of the condition are precisely to be pursued.

Plas. 9 Jac. 5.
Mr Richard
Lee's case.

If a feoffment be made, on condition that if the feoffor shall tender twelve pence to the feoffee such a day, the feoffment to be void, and afterwards the feoffee is disseised of the land, and after the feoffor doth tender the twelve-pence to the feoffee at the day; this is a good performance of the condition.

To tender
money.

(c) And in such case the money shall not be paid to the executors. 5 Co. 96 b.

(d) Where the condition to a mortgage appoints the money to be paid either to the heirs or executors, disjunctively, the mortgagor, if he pays the money on the original day fixed for the payment of, may pay it as he chooses either to the heirs or executors. But where the day of payment is past, the mortgagor's election is gone, and equity requires the money to be paid to the executors, see *Vin. Ab.* and 2 *Freem.* 143, in note. And even where the mortgagee's election is not gone, and he is the money to the heir, yet a court of equity would consider the heir as a mere trustee for the executors and would compel him to pay the money to them. See *Barnard.* 50. 2 *Ventr.* 351. Where no mention is made in the condition whether the mortgage money is to be paid to the heirs or executors, it must be paid to the executors. 1 *Cha. Cas.* 283. In short, as the money came out of the mortgagee's personal estate, it may be laid down, as a general rule, that when the mortgagor repays it, or the mortgagee's death, the mortgagee's personal representatives and not his heir at law are the persons entitled to it.

To re-infeoff.

If a feoffment be made to two men on condition that they shall re-infeoff the feoffor, or make a lease to him by a day, and before the day one of them die, and the survivor doth re-infeoff, or make the lease; this is a good performance of the condition. And so also it seems the law is, if both the feoffees be living, for by his own acceptance it seems he hath dispensed with the condition, and so cannot enter for the breach of it.

Dier 69.
41 E. 3. 25.

* P. 142.

If a feoffment be made on condition, that the feoffee shall infeoff the feoffor of the manor of *Dale* by such a time, and before the time appointed the feoffee doth grant a rent charge out of the manor to a stranger, and then at the time appointed makes a * feoffment of the manor according to the condition; in this case, this is a good performance of the condition. But if in this case the feoffee before the time appointed grant away to a stranger twenty acres parcel of the manor, and then doth make a feoffment of the manor according to the condition; this is no good performance of the condition. And if a feoffment be made on condition that the feoffees or lessees, in trust, of such land shall grant an annuity out of it, and some of them only do grant this annuity; this is no good performance of the condition.

Plow. 23. 3H.
7. 4. 21 H. 6.
101.

To make a lease.

If there be a feoffment made, upon condition that the feoffee shall make a lease of land to the feoffor for life, the remainder to *I. S.* in fee, and the feoffee make a lease to the feoffor for life, and after by another deed doth grant the reversion to *I. S.* this is a good performance of the condition.

44 E. 3. 22.

To purchase lands;

If a feoffment be made, upon condition that the feoffee shall purchase lands or tenements to the value of twenty pounds *per annum*, and he purchase a rent, common, or any such like thing, to that value; this is a good performance of the condition. But if in this case the feoffee and another purchase so much land together jointly; this is no good performance of the condition. So if the feoffee alone purchase lands to the value of twenty pounds *per annum*, and there is a rent issuing out of it which must be deducted; this is no good performance. And yet in these cases, if the stranger joint-tenant release to the feoffee all his right in the land, or the grantee of the rent release to him the rent before the time of the performing of the condition, the condition is well performed in both cases. *Tantum valet terra quantum vendi potest.* And if one make a feoffment in fee, on condition that if the feoffee purchase land to the value of twenty shillings, the feoffment shall be void, and after the feoffee disseise another man of land to that value; it is said that by this the condition is performed; *Sed quere.* And if he recover so much land in value in an action; that this is no performance of the condition: *Sed quere.* For this seems to me a better performance of the condition than the former.

Perk. sect.
807. 808.
21 H. 6. 28.
Dier 15.

Payment.

To pay money.
Tender.

If lands be granted, on condition to pay money, and the money is tendered according to the condition, but either no body is ready to receive it, or it is refused; this is a good performance of the condition. And after a man hath once

Perk. sect.
812.Dier 181. 1A
sect. 334. 338
338.
Co. super 1A.
209.

* Terms of the
law, tit. Coin.

^b Co. super Lit.
212. Fitz.
Barre 343.

^c Co. super Lit.
212.

^d Dier 43.
Co. 5. 96.

Perk. sect.
392.

Adjudged
Mich. 40 &
41 Eliz. B. R.
Powel v. Bar-
tholomew.
Co. 5. 96.
super Lit. 209.

14 H. 8. 17.

once refused the money so tendered to him according to the condition, he hath no remedy in law to recover it, except it be money lent upon a mortgage. * And if the payment be made part of it with counterfeit coin, and the party accept it and put it up, this is a good payment and consequently a good performance of the condition (e). ^b And if at the day of payment the parties do account together, and he to whom the money is to be paid being indebted to the other, that debt by * agreement is allowed, and the residue is paid and accepted; this is a good performance of the condition. ^c So if the party that is to receive it, accept and take new security by bond or statute for the money; this is a good performance of the condition. ^d And so in most cases, when by a condition a thing is to be done one way, and to be done to the party to the condition himself, and not to a stranger, and he doth accept it another way; this is a good performance of the condition (f). *Volenti non fit injuria.* But if the thing to be done, be to be done to a stranger, and one that is no party to the condition, and it be done in any other manner, and he accept thereof; this is no performance of the condition. And so also if the time of doing the thing be past, as if one make a feoffment to me, on condition that if he pay me ten pounds, such a day, the feoffment shall be void, and he doth not pay me at the day, but doth die, and after by agreement between his heir and me, he doth pay me the ten pounds, and I receive and accept it, and thereupon I suffer him to enter and hold the land: in this case the condition is not performed, but I may enter upon him and oust him notwithstanding.

If the mortgagor pay the money according to the condition, and after the mortgagee deliver it to the mortgagor as his own money, the condition is performed, and the mortgagee discharged notwithstanding (g).

If a feoffment be made to *I. S.* on condition that if the feoffor pay to the executors or administrators of *I. S.* ten pounds, the feoffment shall be void, and *I. S.* die, and the ten pounds are paid to the executors of *I. S.* according to the condition, but it is covinously done, i. e. there is a private agreement, that the feoffor shall have all, or part of his money again; this payment in this case, is no good performance of the condition; but that payment that must be a performance of a condition in this case to fetch lands out of the hands of an heir, must be real, full and effectual.

If a lease be made on condition that the lessee shall get the good will of *I. S.* and the lessor doth come to *I. S.* first, and ask his good will, and he deny it him, and after when the lessee doth ask it, he doth grant it him, in this case the condition is performed. So if the condition be, that

Acceptance.

• P. 143.

To get the
good will of
I. S.

(e) But though it may be a good performance of the condition, yet it is apprehended the party could have relief by an action of deceit, or in equity.

(f) See accordingly *Goodale v. Wyet*, Cro. Eliz. 283. Moor, 708.

(g) But so far as the interest of a stranger is concerned, a payment *pro forma*, or a covinously payment is not a satisfaction of the condition. See Cro. Eliz. 383; and see Co, Litt, 209 (b), on the subject of performing conditions *bona fide*.

he shall get his good will by such a day, and at the first being desired he denied it, but afterwards and before the day he doth grant it. And yet if no day be set, and he desire his good will and *I. S.* denieth it and afterwards he doth get his good will; it seems this is no performance of the condition.

If there be two things in the copulative to be done by the condition, both must be done, otherwise the condition will not be performed (*h*).

Perk. sect.
746.
See before.

* P. 144.

2. When the act is to be done by a stranger. To pay money.
3. When the act is to be done to a stranger. To make an estate.

† Tender.

If a feoffment be made, on condition that if the feoffor and *I. S.* * pay ten pounds at Michaelmas, the feoffment shall be void, and before the day the feoffor die, and *I. S.* pay the money; this is a good performance of the condition. But if the feoffor be living *contra* (*i*).

Co. super Lit.
219.

If a feoffment be made, on condition to make an estate to a stranger by a day, and before the day he die; in this case if an estate be made as near the condition as may be, it is sufficient (*k*).

Plow. 123.
Co. 3. 64.

† If a feoffment be made to *I. S.* on condition that he shall infeoff *I. D.* and his heirs; and *I. S.* doth tender the feoffment to *I. D.* and he doth refuse to take it; this is no performance of the condition in this case. But if it be to be done to the feoffor himself, *contra* (*l*). And so also it is, if the condition be to make an estate tail, or any lesser estate to a stranger, and he tender it, and the stranger refuse it; this is no good performance of the condition (*m*). And if a feoffment be made, on condition to re-infeoff the feoffor and his wife in tail, the remainder to *W.* in fee, and he tender it to the wife only, and not to him in remainder; this is no good performance of the condition (*n*).

Co. super Lit.
209. 19 H. 6.
67. Perk. sect.
815. 816. 2 E.
4. 2. 19 H. 6.
67.

And the same law for the most part is in conditions of obligations. See more in *obligations* at numb. 9.

10. What act shall be a breach of a condition in deed: and when a condition in deed shall be said to be broken, or not.
Not to alien.

If a feoffment be made, on condition that the feoffee shall not infeoff *I. S.* of the land, and the feoffee doth make a feoffment to *I. S.* and *I. D.*; this is a breach of the condition (*o*). And so also it is if the feoffee make a feoffment to *I. D.* to the intent that he shall alien to *I. S.* *Quando aliquid prohibetur fieri directo prohibetur & per obliquum*. And yet if the feoffee in the case before alien to *I. D.* and after he doth alien to *I. S.* this is no breach of the condition. And if the condition be, that the feoffee shall not infeoff *I. S.* and he die, and his heir infeoff *I. S.* this is no breach of the condition.

Co. super Lit.
222.
Dier 45. 46.

(*h*) See supra, page 118, note (*d*).

(*i*) If the payment is made in the names of both, it is conceived the payment would be sufficient, as it is not made necessary by the terms of the condition that the payment should be made by the feoffor and *I. S.* in person; and, as we have before seen, a stranger may perform a condition on behalf of a person interested in it.

(*k*) See supra, page 133, note (*a*). and infra, p. 137. notes (*q*) and (*s*), as to the performance of conditions in part impossible at the time of making them, or which afterwards become either wholly or in part impossible by the act of God.

(*l*) See Co. Litt. 209 a. where the reason for the above distinction is given.

(*m*) See last note.

(*n*) See more amply by whom, and to whom, a condition is to be performed, *Marks v. Marks* Str. 129. Vin. Abr. Conditions (K. a.) (L. a.)

(*o*) See supra, page 123, note (*g*), and also pages 129 and 130, notes (*p*) and (*s*), on the subject of conditions in restraint of alienation.

Dier 45. 65.

Per 3 Justices
R. R. 3 Jac.

Dier 6.

Dier 152.
Ca. 4. 190.Hil. 38 El.
Marsh v. Cur-
tis.

If a lease for years be made, on condition that the lessee shall not assign, or alien, the term, or the land, during his life, without the licence of the lessor, and the lessee doth give it by his will without licence; this is a breach of the condition and forfeiture of the estate (p). But if he make an executor of his will only, this is no breach. And if the condition be that the lessee shall not alien, and he die, and his executor alien, this is no breach of the condition. And if the condition be that the lessee shall not alien but to his children, and the lessee by will devise it to his executors; it seems this is a breach of the condition. So if he devise that A. his son shall have his term after his wife, and doth make A. his son his executor; it seems this is a breach of the condition. But if he do not make A. his executor *contra*. And in cases of devise, albeit the executors do not assent, yet the condition is broken, as in case where a reversion is granted on condition that the grantee shall not alien it, and he doth alien it, but no attornment is to this grant; yet it seems this * is a breach of the condition (q). And if a lease for years be made, on condition that the lessee or his assigns shall not alien, and the lessee doth make his wife his executrix, and she doth take another husband, and he doth alien it; it seems this is a breach of the condition, and a forfeiture of the estate. But if a lease be made on condition that the lessee shall not alien without the licence of the lessor, and after the lessor die, and the lessee assign, or the lessee die, and his executors, or administrators, assign; this is no breach of the condition in either of these cases (r). So if a lease be made, on condition that the lessee shall not alien the term during his life, and he makes an executor, but doth not devise it to him; this is no breach of the condition. And if a lease be made, on condition that the lessee his executors or assigns shall not alien the term to any persons without the licence of the lessor, but to the wife, or one of the children, of the lessee, and the lessee die, and his executors alien to one of the children of the lessee, and he alien to a stranger without licence; this is no breach of the condition (s). And if one make a lease of a house and land, on condition that the lessee shall not parcel out the land or any part of it from the house, and the lessee doth grant all his term in the house and part of the land, and

* P. 145.

(p) See *supra*, page 123, note (q), on the subject of conditions restraining lessees from assigning and under-letting.

(q) Attornment is now unnecessary; but supposing attornment was essential to the grant of a reversion, and the deed in the case put in the text could not take effect in any other way, then it is received, there would be no alienation, and consequently the conveyance, or rather intended conveyance, would not be a breach of the condition.

(r) And if the condition be not to alien the land, or any part thereof, and the lessee aliens part without the lessor's assent, he may afterwards alien the residue without his assent; the whole condition being gone, for it cannot be divided. *Rol. Abr.* 471. See further *Com. Dig.* Condition (Q). But where the condition is that the lessee shall not alien *without the lessor's consent*, and such consent is given to alien part, can the lessee in this case, alien the residue without consent? See *supra*, page 143, note (e).

(s) In *Dyer*, 152 a. *Brooke*, *Brown*, and *Dyer* held, that by the grant to one of the sons the reversion was not determined, and that the son could not grant over to a stranger without licence; but *Sanford* and *Catline*, *contra*. See further in the case of *Thornhill* and *Adams v. King and Wife*, *Cro.* 737.

doth

doth keep the rest, and after doth lease that part also; this is a breach of the condition.

Not to suffer a woman with child in the house.

If a lease be made of a house, on condition that the lessee shall not suffer any woman great with child to harbour or lodge in the house six days after notice given by the lessor, and the lessee do suffer any such person after notice given, albeit the lessor consent to it; yet the condition is broken. But if the lessor do *volens volens* keep such a woman there against the mind of the lessee; this is no breach of the condition.

Co. 3. 92.

Not to do waste.

If a lease be made, on condition that if any waste be done; the lessor shall re-enter; in this case if the house fall by a tempest, this is no breach of the condition, for this is not waste; but if it be uncovered by tempest, and the tenant hath a convenient time to repair it, and doth not, but doth suffer the timber to perish for want of covering; this is a breach of the condition, and the lessor may enter and put out the lessee. † And if a lease be made, on condition that the lessee shall not do waste, and he suffer waste to be made in decay of the houses, &c. it seems the condition is broken. *Sed quare* (†).

12 H. 4. 5.
Bro. Condition
40.

Not to sell it to any other till the lessor refuse it.

If a lease be made, on condition that if the lessee be minded to sell his estate the lessor shall have the first offer thereof, giving as much as another will give; in this case if the lessee doth not give notice when he is minded to sell it, he doth break the condition; but if when he is minded to sell, he doth tell the lessor of his purpose, and what he is offered for it, and the lessor doth either say he will not have it, or that he will not give so much for it, or doth not accept it, but doth delay, &c. and then the lessee doth sell it to another; this is no breach of the condition, neither is he bound to wait upon him in this case.

† Per Dier and
Walsh, Jus-
tices.
Dier 281.

Dier 13.

* P. 146.

To make an estate.

If a feoffment be made, on condition that the feoffee shall make a feoffment in fee, gift in tail, lease for life, or years, of the land, to the feoffor, or to a stranger for a day; and before the day the feoffee doth disable himself to do it, either by making some estate of the same thing to some other person in tail, for life, years, in present or future, or for one year, or by taking a wife whereby she may be entitled to dower, or by suffering a recovery of the land, or by granting of any rent, common, or the like, or by entering into any statute, &c. or by suffering any judgment to be had against him, or by doing any other such like act, whereby he cannot convey the land according to the condition in the same plight, quality, and freedom it was in at the time of the conveyance made; in either of these cases the condition is *ipso facto* broken. And albeit the land be afterwards discharged, and the party again enabled before the day to perform the condition, yet this will not save the breach. And so also it is of a limitation. But when the condition is to be performed on the part of the feoffor or grantor, there disability before the time will not hurt, so as he be again enabled at the time. And so also it is when the condition is to be performed on the part of the feoffee, and there is no certain day set for the perform-

Co. super Lit.
221. 222.
Co. 2. 58.
Perk. sect.
802. 803. Lit.
sect. 355.
Co. super Lit.
206.

(†) See *supra*, page 122.

ance of the thing, for in this case albeit he be once disabled, yet if he be afterwards again enabled, and do it within the time that the law doth give him to do it; in this case the condition is not broken. And so also it is, if the feoffee be disseised, and, during the disseisin, he do any such act as before; in this case before his entry this is no breach of the condition, for till then the charge doth not bind the land. And so likewise it is when the disability doth proceed from another cause, as where one doth make a feoffment, on condition that the feoffee shall re-infeoff before such a day, and before the day the feoffor disseise the feoffee, and keep him out till the day be past; or one doth make a feoffment, on condition the feoffee shall marry B. before such a day, and before the day the feoffor himself doth marry her, so that the feoffee cannot perform the condition; in these cases the condition is not broken (u).

Trin. 13 Jac.
Shade v. Tomp-
son, B. R.

If one make an estate of lands (held in *capite*) on condition that he to whom it is made, shall employ the profits thereof to divers charitable uses (x), and he die, his heir within age, by reason whereof the king hath the land during the minority of the * heir, so that the profits cannot be employed (y); this is no breach of the condition.

To employ the profits to charitable uses.

* P. 147.

Co. 1. in Por-
ter's case.

If one make a feoffment of land, on condition to re-infeoff in convenient time, and the feoffee doth not so, but doth make a lease to another; this is a double breach of the condition. And the same law is of a devise by will in this manner.

To re-infeoff.

Perk. sect.
796. Co. 8.
90. See the
parable Mat.
21. 28.

If a feoffment be made, upon condition that the feoffee shall make some estate to the feoffor, or some other, by a day, and the feoffee before the day, say to him to whom the estate is to be made, that he will never make the estate, and notwithstanding he doth make the estate before the day according to the condition; in this case it is said the condition is broken. *Sed quere* of this, for it seems if he really deny it before, and actually perform it at the day; that this is a good performance of the condition. As if a lease be made of a house, on condition that the lessee shall not disturb the lessor in the taking away of his goods out of the house, and when the party doth come or send to fetch them, the lessee doth only forbid them; this in this case is no breach of the condition, and it was agreed in this case that words without some deed, as shutting the door against them, forcible resistance, or laying of hands upon them, or the like, are no breach of such condition. And if a lease be made, on condition that the lessor shall be four times a year in the house demised, without being ousted by the lessee, and the lessee, seeing him coming, doth shut the door or windows against him; this hath been thought to be no breach of this condition.

To make an estate.

To suffer one to take his goods.

3 H. 4. 8.

To suffer one to come into a house.

Dier 33.

If a lease be made, on condition that the lessee shall pay yearly to the lessor during the term ten pounds; in this case if he fail of payment once, the condition is broken,

To pay a yearly rent or sum.

(u) Such acts on the part of a feoffor amount to a dispensation with, or waiver of the condition. But if such acts are done by a stranger they cannot excuse the performance of the condition.

(x) See the act of 9 Geo. 2. c. 36, relative to dispositions to charitable uses.

(y) See the act of 12 Car. 2. c. 24, which takes away wardship, &c.

- and estate forfeit. So if one make a feoffment in fee of land, on condition to pay ten pounds yearly to *I. S.* if he fail once the condition is broken.
- Not to molest copyholders.** If a lease be made of a manor in which are divers copyholders, on condition that the lessee shall not molest, vex, or put out any copyholder paying his duties and services, in this case if the lessee enter upon, and put out any one copyholder, this is a breach of the condition. But if he enter *vi & armis* upon a copyholder's tenements, and there beat him only, or the like; this is no breach of the condition. Penner v. Glover, 37 & 38 El. Mich. B. R. per curiam.
- To pay rent.** If there be a condition to pay rent, and the lessee let part of the land to other under-tenants, or let all the land to another for part of the time, and he undertake the rent still, and fail of payment; in this case the condition is broken, and the estate forfeit (z). But if there be any covin and practice in the case, between the first lessor, and the lessee, the under-tenants may perhaps have relief in equity. Crompt. Jas. 64. 65.
- Equity.**
- Not to disturb.** If one make a lease for years of land, and then also make a feoffment in fee of the lands, on condition that if the lessee be *disturbed in his term that he shall have the fee simple, and he is disturbed by the feoffor or by his means; in this case the condition is broken, and the lessee shall have the fee simple. But if the disturbance be by a stranger, and not by the feoffor, or by his means, or consent; this is no breach of the condition. Co. s. 90.
- *P. 148.
- Not to be outlawed.** If a lease be made, on condition that the lessee shall not be outlawed, and he is outlawed without proclamation; it seems this is no breach of the condition, because the outlawry is not good. Per 2 Justices. H. 7 Jac. B.R.
- If a condition possible at the time of creation, become after impossible in part by the act of God, and the party do not perform that which is possible, the condition is broken (b). Lit. sect. 338. Co. 2. 59.
- If a man make a lease for years on condition, and the lessee doth not know of it, and after the lessor doth by will give the land to the lessee without condition, and the lessee doth such an act as is a breach of the condition; in this case the condition is not broken, for the lessee must have notice of the condition ere he can break it. Co. s. 92.
- To pay rent.** If a lease be made rendering rent, on condition, that if the rent be not paid within twenty days the lessor shall re-enter, and the rent is not paid; in this case the condition is broken, but the lessor cannot enter until he hath made a legal demand, and if he die before he do it, his heir shall Doct. & Stud. 35. 13 H. 4. 17.

(z) And if the lessee should have granted under-leases, the estates of the under-tenants would be defeated by the forfeiture.

(a) Covins, frauds, and deceits, for which there is no remedy by the ordinary course of law, are properly cognizable in equity; and matters of fraud were one of the chief branches to which the jurisdiction of chancery was originally confined. 4 Inst. 84. Bac. Abr. Fraud (B). Equity will give relief, although it is agreed, that no relief shall be prayed in equity. 1 Mod. 305. See fully in what cases relief may be had in equity. Com. Dig. Chancery (3 F.) Vin. Abr. Chancery (N.) 2 Atk. 306 1 Ves. 95. 126. 387. And see Mr. Maddock's valuable work on the Principles and Practice of the Court of Chancery.

(b) See *supra*, page 133, note (a), and *infra*, page 157, notes (q) and (s), as to conditions in part impossible at the time of making them, or which afterwards become wholly or in part impossible by the act of God.

never take advantage of that breach, but it is discharged for ever (c).

Lit. sect. 353.
Plow. 30.

When an act is to be done in time convenient, or otherwise, and the party do it not by the time appointed by law; the condition is broken (d).

21 Ed. 3. 7.
8 H. 6. 24.
Dier 369.

If one grant an annuity *pro consilio impenso & impendendo*, and the grantor require advice, and the grantee refuse or neglect to give it; this is a breach of the condition, and a forfeiture of the estate. And if the deed be, that he shall go to such a place to give counsel, and he require him to go thither, and he refuse it, this is a forfeiture of the estate. But if he refuse to go with him to another place, or give counsel to his adversary, being not required to give counsel to him, this is no breach of the condition nor forfeiture of his annuity. And if one had heretofore devised his land to be sold by his executors (e), and to have been distributed for his soul (f), and the executors had not sold it in time convenient, or had taken the profits to their own use; this had been a breach of the condition. See more in the last foregoing division, and in *obligation*, numb. 10. *covenant*, numb. 7. The same law is for the most part of conditions of obligations. See *obligation*, numb. 10.

To give advice.

Lit. sect. 383.

Co. 2. 15. 8. 44.
super Lit. 233.

Every particular estate hath a condition in law annexed to it: and therefore if tenant for life in dower, by the courtesy, or in tail after possibility of issue extinct, lessee for years, tenant by statute merchant, elegit, or the like, make any absolute or conditional estate of the lands they hold, in fee simple, fee tail, or for life, and give livery of seisin thereupon, or levy a fine *Sur consensance de droit* (g), or suffer a recovery (h) of the land, * or the like; this a breach of the condition in law and a forfeiture of their estate (i). Also if any such tenant (except tenant in tail after possibility of issue extinct) (k) do waste in the lands

11. When a condition in law shall be said to be broken, or not. Forfeiture.

* P. 149.

(c) Where the remedy is by way of *re-entry* for non-payment, there must be an *actual demand* made previous to the entry, otherwise it is *tortious*; because a condition of *re-entry* is in *derogation* of the *grant*; and therefore unless there be a *demand* made, and the tenant appears not to be on the land ready to pay his rent, the law will not allow the lessor the benefit of *re-entry* to defeat the tenant's estate without a wilful default in him, which cannot appear without a *demand* hath *actually* been made upon the land. [Query where the power of *re-entry* is expressly reserved, "although no demand shall be made," may not the *re-entry* in this case be made without a previous demand?] See further as to *demand* of rent, and in what cases necessary, Gilb. on Rents, 73. and Bac. Abr. Condition (O. 3.) Acceptance of rent is in certain cases a waiver of a right of *re-entry*; see *supra*, page 123, latter part of note (q).

(d) In some cases where no time is mentioned for the performance of the condition, the party who is to perform it has his whole life to perform it in. See Co. Litt. p. 403 a. and in other cases the performance may be accelerated by request. See *supra*, page 134, text.

(e) See the statute of 21 Hen. 8. c. 4. enabling one or more of the executors, (where a power of sale is given,) to sell; and see 2 Co. Litt. (Mr. Thomas's ed.) page 118, note (H. 3.)

(f) Devices for such superstitious uses are made void by statute 1 Edw. 6. c. 14. sect. 10.

(g) But if a fine *sur consensance de droit* is expressly confined to such estate as the consensor has in the land, there no forfeiture will be incurred. See *supra*, page 14, note (e).

(h) Where a tenant for life has a remainder in tail though ever so remote a one he may suffer a recovery without incurring a forfeiture. See *supra*, page 43, note (u).

(i) The condition annexed by law being, that they shall not attempt to create a greater estate than they are themselves entitled to. 2 Bl. Com. 153. Co. Litt. 215.

(k) For although by the possibility of issue being extinct and gone, he is become in effect, as to the condition of his estate, only tenant for life, yet, having by the original creation of his estate an estate of inheritance, the nature of the estate is not so far changed by the possibility of issue being extinct, that that he continues to have in it an exemption from waste.

they

Infant.
Woman co-
vert.

they do so hold; this is a breach of the condition in law, and a forfeiture of their estate in so much as the waste is committed. But if an infant, or feme covert, that hath such an estate, shall make any such estate, &c. this is no breach of the condition in law. And yet if such a person do waste this is a breach of the condition in law. And so also if any such person be an officer, and do any thing which is a cause of forfeiture in another; this will be a forfeiture in him or her also.

If any keeper of a park, without warrant, kill any deer, fell or cut any wood, and convert it to his own use, pull down the lodge, or any house within the park, used for hay for the deer, or the like; this is a breach of the condition in law. So also if a keeper shall not look to the game, but the deer be killed by his default, and damage come to the Lord; by this also the condition is broken. But the not attending upon such an office for two or three days, if the Lord have no special loss thereby, is not cause of forfeiture.

Co. super Lit.
223.

Offices that are for the administration of justice, or of clerkship in any Court of Record, or concerning the King's treasure, revenue, account, alnage, auditorship, &c. have also conditions in law annexed to them; and therefore if such officers shall sell their offices or misdemean themselves in their offices, by this the condition in law may be broken, and they may forfeit them (l).

Co. super Lit.
234.

12. Who may
enter for a
condition
broken; and
what persons
shall take ad-
vantage of a
condition or a
limitation; and
what not.

As no man may create or annex a condition to an estate but he that doth create the estate itself (m), so neither can a man give or reserve the power, title or benefit of re-entry and avoidance of an estate upon the breach of a condition to any other but to him, or them, or at least to one of them that doth make the estate, his or their heirs, executors and administrators, &c. for it is a rule of the common law, that none may take advantage of a condition but parties and privies in right and representation, as heirs, executors, &c. of natural persons, and the successors of politic persons: and that neither privies nor assignees in law, as lords by escheat, nor in deed, as grantees of reversions, nor privies in estate, as he to whom a remainder is limited, shall take benefit of entry or re-entry by force of a condition (n). And therefore if a man had made a lease for a life reserving rent, on condition that if the rent be behind, the lessor, his heirs and assigns shall re-enter, and after had granted the reversion to a stranger; this grantee should not by the common law have had benefit by this condition. But if the lessor had died, his heir,

Lit. sect. 347.
Plow. 175.
Co. 3. 12. 347.
5. 56. Dier
131. Co. super
Lit. 214. 215.
Doct. & Stud.
93. Perk. sect.
830. 831. 833.
835. Plow.
488. 489.

(l) See the act of the 5th & 6th Edw. 6. c. 16. and see also Treatise on Marriage Settlements, p. 76 on the subject of selling offices concerning the administration of justice or the receipt of the king's revenue: and see the act of the 59 Geo. 3. c. 126, for preventing the sale and brokerage of offices; and see also the acts of the 50 Geo. 3. c. 83 and 88. and 52 Geo. 3. c. 66.

(m) In assignments of terms of years, a condition may be annexed to the assignment, [see supra page 126. note (e), as to conditions to chattel interests and things executory] and in conveyances of estates of freehold, the same may be done as between the grantor and grantee.

(n) The above is to be understood of conditions at the common law, and not of conditions operating under the Statute of Uses, or conditional limitations; concerning which, see note at the end of this chapter.

or the guardian in chivalry (p) or socage of such an heir, if he had been an infant *and in ward, might have taken advantage by the condition. And if one had been possessed of a lease for years, and had granted his term upon condition, and had died; his executors or administrators might have had advantage of this condition.

* P. 150.

Co. super Lit.
292. 12.

And at this day the law is still the same as touching privies in blood; for an heir shall take advantage of a condition, though no estate descend to him from the ancestor. And therefore if one be seised of land of the part of his mother, and he make a feoffment in fee of it on condition, and die, and the condition is broken; in this case the heir of the part of the father shall enter; but as soon as he hath entered, the heir of the part of the mother shall enter upon him and enjoy the land (r). And if a man be seised of land in the right of his wife, and he make a feoffment in fee of it upon condition, and die; the heir of the husband shall enter for the condition broken, but the wife shall have the land (s). And so also is the law as touching privies in right and representation; for executors and administrators shall take advantage of a condition now as heretofore. And so also shall the successors of a Dean and Chapter, Bishop, Arch-deacon, Parson, Prebend, or any body politic or corporate, ecclesiastical or temporal; these shall take advantage of conditions as heretofore they did. So also the law is the same as touching privies in law; for they shall no more take advantage of a condition now than heretofore. But as touching grantees of reversions, and privies in estate, there is some alteration made of the law; for by a new law it is provided, that all persons which shall have any grant of the King of any reversion, &c. of any lands, &c. which appertained to monasteries, &c. as also all other persons being grantees or assignees, &c. to or by any other person or persons, and their heirs, executors, successors and assigns, shall have like advantage against the feoffees, &c. by entry for non-payment of rent, or for doing waste, or for other forfeiture, &c. as the said lessors or grantors themselves ought or might have had (t).

Inst. 32 H. 8.
ap. 34.

Co. super Lit.
14. Plow. 27.

And for the true understanding of the sense of this statute and the ancient common law further touching this point, 1. These diversities must be observed to be taken, before the statute will take place still.

(p) Guardianship in chivalry taken away by the statute 12 Car. 2. c. 24.

(r) Suppose the heir on the part of the father should refuse to enter, or should release his right of entry, is the heir on the part of the mother to lose the estate? If so, the person entitled to the estate means of recovering the estate, which is repugnant to a leading maxim of law, viz. that there is no right without a remedy.

In this case, if the heir on the part of the husband should refuse to enter or should release his right of entry, the heir on the part of the wife would not be without a remedy, for the alienation by the husband alone, even if there had been no condition, would not have bound the wife or her heirs, and the circumstance of there being a condition would not prevent the wife or her heirs from entering.

See more amply what persons may by force of this statute of 32 Hen. 8. c. 34. take advantage of a condition broken, in Co. Lit. 215. Cro. Eliz. 832. 5 Co. 112. b. 2 Leon. 33. Vin. Abr. Covenant 2.) Com. Dig. Condition (O. 2.)

• P. 151.

1. Between a condition that doth require a re-entry, and a limitation that doth *ipso facto* determine the estate without entry; for albeit a stranger might not take advantage of the first, yet he might take advantage of the last, by the common law. And therefore if a man at this day make a lease to another *quoutque*, or until *I. S.* come from *Rome*, or if a man make a lease to a woman *quamdiu casta vixerit*, or if a man make a lease to a *widow *si tamdiu in pura viduitate viveret*, or if a man make a lease to another for one hundred years if he live so long, and then the lessor doth grant the reversion to a stranger; in all these, and such like cases, the grantee of the reversion may take advantage of the limitation; for after the estate is ended by the limitation he may enter (u).

Co. 10. 36.
F. N. B. 201.

2. Between a condition annexed to a freehold, and a condition annexed to a lease for years; for if before the statute a man had made a gift in tail, or lease for life, on condition that if the donee, or lessee, did not pay ten pounds by such a day, the gift, or lease, should be void, or cease; in this case the grantee of the reversion could not by the common law have taken advantage of the condition; for it could not be void, or cease, but by entry, which could not be transferred to another. But if a lease for years had been made on such a condition; a grantee of the reversion might by the common law have taken advantage of this condition, for the estate in this case was by the breach of the condition *ipso facto* void, without entry. But now the grantee of the reversion shall have advantage of the condition in both these cases (x).

Co. 3. 64, 65.
Co. super Lit.
214. 11 H. 7.
17. Plow. 156.

3. Between a condition in deed, and a condition in law; for by the common law not only the grantee of the reversion, but also the Lord by escheat, may either of them have advantage of a condition in law for any breach in his own time.

Co. super Lit.
214.

2. These resolutions and judgments upon the statute must be marked. 1. That the statute is general, and the grantee of the reversion of every common person, as well as the King, may take advantage of conditions. 2. That the statute doth extend to grants made to the successor of the King, as well as to the King, albeit he only be named in the statute. 3. That he that comes to the reversion by fine, feoffment, grant, limitation of use, common recovery, or bargain and sale, is such a grantee as is within the intendment of the statute. 4. That where the statute doth speak of feoffees, &c. it doth not extend to gifts in tail; and therefore if a gift in tail be upon condition, and after the donor doth grant the reversion; this grantee shall never have any benefit of this condition. 5. That where the statute doth speak of grantees and assignees of the

Co. super Lit.
214. Co. 5. 15

(u) In all the above cases there is no condition to determine the estate, but the estate in its duration is only to continue till *J. S.* returns from *Rome*, or so long as the lessee lives chaste, &c.; so as soon as *J. S.* returns from *Rome*, the estate determines of itself, and the reversion expectant on it comes immediately into possession.

(x) See accordingly and further Vin. Abr. Condition (N. d.) pl. 10.

reversion, hereby an assignee of part of the state of the reversion may take advantage of the condition; as if lessee for life be, and the reversion is granted for life, &c. or if lessee for years be, &c. and the reversion is granted for years, &c. in these cases, the grantees of the reversion shall have advantage of the conditions.

† Davy and
Matthew's case
per 2 Justices,
Trin. 14 Jac.
B. R.

Co. 5. 112. 113.
Co. super Lit.
214.

Co. 5. 113. 114.
Co. 8. 92.

† So if a lessee for one hundred years make a lease for ten years, rendering rent, with condition of re-entry, and the first lessee doth afterwards grant his term and estate to *I. S.* in this case, *I. S.* * is such a grantee, and assignee of the reversion, as shall take advantage of the condition. 6. That as well mediate, as immediate, grantees, i. e. the grantees of grantees in *infinitum*, are intended within this statute. 7. That a grantee of part of the reversion cannot take advantage of a condition by this statute. And therefore if a lease be made of three acres, reserving rent, upon condition, and the reversion is granted of two of the three acres; in this case the rent shall be apportioned, but the condition is destroyed, except it be in the King's case. And yet a condition may be apportioned by the act of law, or by the wrong of the lessee (y). As if a lease be made of two acres (the one of the nature of borough English, and the other common law) upon condition, and the lessor having issue two sons, dieth, in this case, each of them shall enter for the condition broken. And if the lessee upon condition make a feoffment of part of the land: this doth not destroy the condition. There is therefore herein a difference between a condition that is compulsory, and a power of revocation that is voluntary: for he that hath such a power may by his own act extinguish it in part, by levying a fine of part of the land or otherwise, and yet his power may remain for the residue as in the case of a limitation; but in the case of a condition he cannot do so (a). 8. Such grantees as shall have advantage by this statute, must be complete grantees; and therefore grantees of reversions by fine, or deed, must have attornment ere they can take advantage of the condition. And yet if a reversion be granted by fine to one that hath no attornment, and he grant it to another that hath an attornment; in this case the second grantee shall take advantage of the condition, albeit the first grantee shall not (b). And the lessee must have notice of the grant of the reversion, ere he in reversion can take any advantage of a condition. And therefore it is, that if the lessor bargain and sell the land by deed indented and inrolled (in which case there

* P. 152.

Prerogative.

Apportionment.

Power of revocation.

(y) See accordingly, Dyer 308.

(a) If a person who is entitled to the benefit of a condition levies a fine of the lands (except such as should be by way of further assurance) it will extinguish the condition; and a condition being an entire thing, if the fine should be levied of part of the lands the condition would be destroyed for the whole. By a fine with proclamations, levied by the grantee of the estate, and five years non-claim the right of entry under the condition arose, the person entitled to the benefit of the condition could be barred of his entry.

(b) For the doctrine of attornment, see chapter 13, post. Attornment is rendered unnecessary by the statutes of 4 Ann. c. 16. § 9. and 11 Geo. 2. c. 19. § 11.

needs no attornment); or if the lessor make a feoffment of the land, and so oust the lessee, and the lessee re-enter (which is an attornment in law); the grantee, or feoffee, in these cases, cannot take advantage of any condition, before he hath given notice to the lessee of this grant of the reversion. 9. Such as come in merely by act of law, or paramount, as the lord of a villain, the lord by escheat, the lord that doth enter for mortmain, or the like, cannot take advantage of a condition within this statute. And hence it seems it is, that if lessee for forty years make a lease for thirty-seven years on condition, and after surrender his estate to his lessor; that the surrenderee shall not have advantage of this condition. 10. † Albeit the words of the statute be general, yet grantees and assignees shall not take benefit of every forfeiture by force of a condition, nor yet of all conditions, but only of such as are inherent, * i. e. such as are either incident to the reversion, as for payment of rent, or for the benefit of the state, as for restraining of waste, for causing of reparations, making of fences, scouring of ditches, preserving of woods, and the like. And of conditions that are collateral such grantees shall not take benefit. And therefore if the condition be for payment of a sum of money in gross, to restrain alienation, for the delivery of corn, wood, or the like, the grantee of the reversion of the land shall not have advantage of it by this statute; for these remain as they were before the statute, at the common law. 11. Such conditions as are on the part of the lessor, it seems are not within this statute; and therefore if one make a lease for years, on condition that if the lessor, his heirs or assigns, pay ten pounds to the lessee at Lady-day, the lease to be void, and the lessor doth grant the reversion to a stranger before the day; it seems the grantee shall not take advantage of this; but the condition is gone.

* P. 153.

Co. super Lit.
214. Pasche
7 Jac. Co. B.
per 2 Justices.

† Co. super
Lit. 215. Dier.
309. Curia in
Leek's case,
Pasche 7 Jac.
Co. B.

Per Justice
Bridgman.

If one make a lease for years rendering rent to him and his heirs, on condition that if it be not paid within fourteen days, that he and his heirs shall re-enter, and the rent is behind, and the lessor doth demand it, and then die; in this case the heir may enter. But if he die before demand, the heir cannot make a demand, and so take advantage of that breach of the condition, which was in the time of his ancestor.

Doct. & Stud.
35. 13 H. 4. 17.

If a man be possessed of land for twenty years in the right of his wife, and he make a lease of it for ten years rendering rent, with condition of re-entry for default of payment, and after the husband die; in this case the wife shall have the rent (c), but it seems she shall not take advantage of the condition.

Perk. sect.
834.

(c) In Wingate's Maxims, 213, pl. 12. and Co. Lit. 46. b. it is laid down that where the husband alone makes a lease of his wife's leasehold for years, and dies during such lease leaving his wife surviving, that the rent reserved on such lease does not follow the reversion and belong to the wife, and that the husband's personal representatives are entitled to it. But see *Blaxton v. Heath*, Poph. 1 and see Mr. Hargrave's note, Co. Lit. 46. (b).

Co. 1. 85.
super Lit. 379.
Dier 127. 117.

If a lease be made to *I. S.* on condition that if such a thing be, or be not done, that the land shall remain to *I. D.* or that *I. D.* shall enter; in this case *I. D.* shall never take advantage of this condition, either by the common law, or by this statute (*d*).

Co. super
Lit. 218. 237.

Regularly where a man will take advantage of a condition, if he may enter, he must enter, and when he cannot enter, he must make a claim; for an estate of freehold or inheritance will not cease without entry or claim (*e*). And he that is to have advantage by the condition, may waive his advantage if he will. And until such entry or claim made, the party that should enter can make no good estate of the thing to any other. But herein a difference is to be observed in the penning of a condition, between a lease for years, and a lease for life, or a greater estate: for if a lease for years be made, on condition that upon such a contingent the estate shall cease, or the lease shall be void; in this case when the thing doth happen, the lease is *ipso facto* void without entry or claim. But otherwise it is of a lease for life, albeit there be the same words in the condition. And if one make a lease for years, on condition that if such a thing be done, the lessor shall re-enter; in this case an entry is needful to avoid the estate.

13. Where entry or claim is needful to avoid an estate on condition: and where a man may take advantage of a condition without entry, or claim; and where not.

• P. 154.

If one make a feoffment in fee, gift in tail, or lease for life, on condition that upon such a contingent the estate shall be void; in this case there must be an entry made, after the condition is broken, to avoid the estate. So if one bargain and sell his land by deed indented and inrolled, with proviso that if the bargainor pay, &c. then the estate shall cease and be void, and he doth pay the money; in this case the estate is not re-vested in the bargainor, before an actual re-entry is made. And so it is also if lands be devised to a man and his heirs, on condition that if the devisee do not pay twenty pounds at a day, his estate shall cease and be void; in this case the estate is not void until an actual re-entry be made. And so also it is if a reversion, remainder, advowson, rent, common, or the like, be devised on such a condition; in these cases there must be a claim, before the estate will be determined. And therefore if a man grant such a thing to another and his heirs, on condition that if the grantor pay twenty pounds on such a day, the estate of the grantee shall cease or be void, and the grantor doth pay the money according to the condition; in this case the estate is not re-vested in the grantor before a claim made at the church in case of an advowson, and in other cases upon the land. But in case where a man cannot

(*d*) But if the lease was made under the Statute of Uses the limitation to *J. D.* would be good as a leasing use or conditional limitation. See note at the end of the chapter on the subject of conditional limitations.

(*e*) Entry by a legal owner is a notorious act of ownership and equivalent to a feodal investiture by the lord, and gives the owner seisin, and makes him complete owner of the estate and capable of conveying it from himself either by descent or purchase. See further, as to the nature and manner of making entry and claim, Co. Lit. 15. 254 b. 3 Bl. Com. 175. 4 vol. 147.

make

make an entry or claim, there the law will not compel him to it. And therefore if one grant land to another for five years, on condition that if he pay to the grantor within the two first years forty marks, that then he shall have the fee, otherwise but for term of five years, and livery of seisin is made accordingly, and the grantee doth not pay this money; in this case after the two years are past, the freehold shall be in the grantor without entry or claim; for as this case is, he cannot enter, but he must oust the lessee of his term. So if I grant a rent charge out of my land upon condition; when the condition is broken, the rent is extinct, and there needs no claim. So if a man make a feoffment of land to me in fee, on condition that I shall pay him twenty pounds such a day, &c. and before the day I let the land to him for years, rendering rent; and after, the condition is broken; in this case he may retain the land without entry or claim, and the rent is extinct. So if one covenant to stand seised to the use of himself for life, or otherwise, and then after to the use of others, with a proviso of revocation, &c. and after, he doth revoke it; in this case all the estates are revested in him without entry or claim.

14. When a condition broken shall make the estate, &c. void, *ab initio*. And when not, And to what intents the lessor, feoffor, &c. shall be adjudged by his re-entry to be in of his first estate. And to what intents not.

* P. 155.

It is generally true, that he that doth enter for a condition broken, doth make the estate void *ab initio*, and that he shall be in of his first estate in the same course and manner as it was when he * departed with the possession, and at the time of the making of the condition (f). And hence it is, that if there be any charge or incumbrance on the land, as if lessee of land upon condition grant a rent-charge out of the land, or enter into a statute, or recognisance, and the conusee have the land in execution, and this charge is after the condition is made; in this case, when the condition is broken, and the party doth re-enter, he shall by relation avoid the rent, statute, and recognisances, and hold the land freed from them all. And if an estate be to pass by way of increase, upon condition; or a lease is to be made upon a condition precedent; when the condition is performed, the party shall hold his estate free from all after charges and clogs. And if a man enter for breach of a condition in law, he shall avoid all charges and acts done after that thing is done, which doth produce the forfeiture; but he shall not avoid any thing done before that time; for he must take the thing as he finds it: as if a house, or land, belong to an officer, in respect of his office, and he grant a rent out of it for his life, and then he doth forfeit it; in this case the rent shall continue (g). And if lessee for life of land grant a rent out of it, and then make a feoffment in fee of the land; in this case the

Co. 4. 120.
Perk. sect.
840. Plow.
186. 482.
14 H. 8. 17

Co. super Lit.
234. Perk.
sect. 843. 844.
Co. super Lit.
233.

(f) It is true, generally speaking, that he that enters for a condition broken shall be seised of his first estate; the rule however fails in many cases: see the instances above, and also in Co. Litt. 202 a. and see further in Com. Dig. Condition (O. 6.) Vin. Abr. Condition (P. d.)

(g) This, it is presumed, cannot be correct where the land belonged to an office which concerned the administration of justice, the receipt of the revenue, &c.; as in that case, it is conceived, the grant of the rent would even be void *ab initio*: See Treatise on Settlements, page 70.

rent shall continue, and the lessor cannot avoid. But if lessee for life of land make a feoffment in fee of it, and then grant a rent out of the land; in this case the lessor shall avoid it. And if a lessee grant a rent out of his land, and then do waste, and the lessor recover the land, he cannot avoid this rent, but shall hold the land charged with it. But if the lessee do waste first, and then he grant a rent-charge to a stranger out of the land, and after the lessor recover the place wasted; in this case he shall hold the land discharged. And if lessee for life make a lease for years, and after enter upon the lessee for years, and make a feoffment in fee; this shall not avoid the lease for years (*h*). And if a man make a lease for years, rendering rent, with clause of entry for non-payment, and the lessee doth make underleases of part of his land, and after the rent is unpaid, and the lessor doth enter; in this case he shall have all the land, and avoid all the underleases. But if there be any covinous practice in the case, the under-tenants may have remedy in equity. And if a lease be made for life, the remainder in tail, on condition; in this case if the condition be broken, both the estates be avoided (*i*). *Et sic de similibus*. But this general rule doth fail in divers particulars: as if a man be seised of land in the right of his wife, and he maketh a feoffment in fee by deed indented, upon condition that the feoffee shall devise the land to the feoffor for life, &c. and the husband dieth, and then the condition is broken; in this case the heir of the husband shall enter, and yet he shall not have the estate of the feoffor, for this doth presently after his entry vanish away (*h*). So if a tenant in special tail hath issue, and his wife dieth, and tenant in tail maketh a feoffment in fee upon condition, the issue dieth, the condition is broken, and then the feoffor doth re-enter; in this case, he shall have but an estate for life, as tenant in tail after possibility of issue extinct. So if a lessee for life, or years, make a feoffment in fee on condition, and after doth enter for the condition broken; in this case he shall not be in the same course, for now his estate is subject to entry for forfeiture, though he be tenant for life still. So if a disseisor be of certain land, and he die seised thereof, and his heir is in by descent, and the disseisee enter upon the heir, and infeoff a stranger upon condition, and the

Crompt. Jur.
64. 65.

Ca. 10. 41.

Co. super Lit.
202. Perk.
sect. 242. 542.
843.

* P. 156.

(A) It is by force, it is presumed, of the doctrine, that estates made before the breach of a condition in law are good, that the practice prevails of making a demise for a long term of years upon trust for the lessor, where he wishes to levy a fine or suffer a recovery of the property, and it is doubtful whether he is tenant in tail or merely tenant for life. By this means if he should in fact be only tenant for life he guards against the consequences of levying the fine or suffering the recovery, viz. a forfeiture of his life estate; for under the trusts of the term of years he would enjoy the property for his life. Where a fine is levied, and a term of years is created in order to guard against a forfeiture, care should be taken that the deed creating the term of years is executed and bears date prior to the term, grand sessions, &c. in, or as of which the fine is levied.

(i) But if the condition is annexed only to the remainder and not to the life estate, there, it is conceived, the life estate will not be affected by the non-performance of the condition. If the condition however was annexed to the life estate, and such life estate is defeated for non-performance of the condition, the remainders would also be defeated. This however is to be understood of pure common law conditions and not of conditional limitations, executory devises, springing uses, &c.

(h) See supra, page 149, note (r).

heir

heir of the disseisor doth enter upon the feoffee, and the disseisee doth sue a writ of entry *sur disseisin* against the heir of the disseisor, and doth recover and hath execution, and the feoffee on condition doth re-enter and after the condition is broken; in this case the feoffor is not in in the same case; for now the disseisor cannot enter upon him, as he might before. And in some cases the feoffor by his re-entry shall be in in his former estate, but not in respect of some collateral qualities: as if tenant by homage ancestrel, make a feoffment of the land he doth so hold, in fee, on condition, and entereth for the condition broken; in this case it shall never be held in homage ancestrel again. And so if a copyhold escheat be, and the lord make a feoffment in fee upon condition, and entereth for the condition broken; in this case the custom annexed to that land is gone (l). So if there be lord and tenant by fealty and rent, and the lord is in seisin of the rent, and granteth his seigniory to another and his heirs, on condition, and the tenant doth attorn, and payeth his rent to the grantee, and the condition is broken; the lord distraineth for his rent, and rescous is made; in this case the former seisin shall not enable him to have an assise without new seisin. If there be lord and tenant, and the lord disseise the tenant of the tenancy, and thereof doth infeoff a stranger on condition, and after the condition is broken, and the lord enter, and the tenant doth enter upon him; in this case the seigniory is not revived (m).

If tenant in tail make a feoffment in fee, on condition, and dieth, and the issue in tail within age doth enter for the condition broken; in this case he shall be in first as tenant in fee-simple, and heir to his father, and then shall be presently remitted: but if he be of full age he shall not be remitted (n).

If one make a feoffment of white acre, and black acre, on condition, &c. and that he shall enter into black acre only; in this case upon breach of the condition, he shall enter into that part only. Co. super Lit.
202. 203.

If the words of a condition be, that if such a thing be not done, the feoffor or lessor shall enter into the land, and take the profits thereof until the thing be done, or to

(l) By the feoffment (and it would have been the same had the lord (if seized in fee) granted the lands for any other common law interest) the copyhold quality of the lands was for ever gone. See Watk. on Copyholds on the subject of the extinguishment of copyhold tenure.

(m) An entry for condition broken does not defeat copyhold grants. Therefore if a feoffment in fee is made of a manor upon condition, and the feoffee grants estates which have escheated, either by copy or for a common law interest, and the condition is afterwards broken and the feoffor enters for the breach of the condition, yet the grants shall not be defeated. See Watk. on Copyhold, 27. If however a lease be made of a manor for years only, with a condition to avoid the estate, and the condition is broken, no copyhold grants made after the breach of the condition will bind the lessor; because the estate of the lessee became absolutely void by breach of the condition without any entry.

(n) Because he might have had his formedon against the feoffee, and the entry for the condition in his own act. Co. Litt. 202. b. *Remitter* is an operation of law, upon the meeting of an ancient right remedial, and of a later defeasible estate in one person, whereby the ancient right is restored and set up again, and the defeasible estate is gone, and lost in the more ancient and better title. Co. Litt. 347. b. For the doctrine of *Remitter*, see 3 Bla. Com. 19. 189. and fully in Com. Dig. and Vin. Abr. tit. *Remitter*.

the like effect; in this case if the feoffor, or lessor, enter upon the breach of the condition, he doth not avoid the estate, or get any thing by his entry, but the possession only in the nature of a pledge, or a distress, until the thing be done; and if the condition be for the payment of the rent, he shall hold the land until he be paid the rent. And if the words be [that the feoffor, &c. shall enter and take the profits, until thereof he be satisfied, or until he be satisfied or paid the rent] in the first case as soon as he is paid, either by the receiving of the profits, or payment of the rent behind, or both together; and in the last case as soon as he is paid the rent by the feoffee or lessee, the feoffee or lessee may enter again into the land (o).

If a condition be possible in its creation, and after become impossible by the act of God, the condition is discharged and gone for ever, and the estate is absolute (p). As if a feoffment be made to me, on condition that I shall re-infeoff the feoffor before a day, or on condition that I shall appear at *Westminster* in the King's Bench such a day, or on condition that I shall go to *Paris* about the affairs of the feoffor before such a day, and before the day appointed it doth happen that I die; in all these cases the condition is discharged. So if the condition of a feoffment be, that if the feoffor, or his heirs, pay ten pounds to the feoffee such a day, and before the day the feoffor dieth without heir; in this case the condition is gone. And if the condition become impossible in part only, then it is discharged for so much only (q).

If there be lord and tenant, and the tenant doth infeoff a stranger on condition, and the feoffee die without heir, so that the tenancy escheat; in this case the condition doth continue, and the lord must hold it subject to the condition.

Albeit a condition cannot be divided by the act of the parties, but it will be destroyed, yet it may be divided by the act of law; and therefore if a lease for years be made of two acres of land (the one of nature of borough English, and the other at the common law) on condition, and the lessor having issue two sons dieth; in this case albeit the condition be divided, yet it is not gone, but doth continue still, and each of them may enter for the condition broken. But if one that hath a condition knit unto his reversion, grant part of his reversion to a stranger; the condition is destroyed in all, for it cannot be apportioned by the act of the parties, as it may by the act of the law or the wrong of the lessee (s).

15. When and by what means a condition shall be discharged and extinguished for ever, or suspended for a time: or not.
1. By the act of God.
Conditions impossible.

2. By the act of law.

Co super Lit.
207. 219.
15 H. 7. 13.
Dier 262.

Perk. sect.
819.

Co super
Lit. 215.
Co. 4. 120.

(o) See further what act destroys a condition, *Com. Dig. Condition (Q)*.

(p) See *supra*, page 133, notes (a) and (b).

(q) And if the condition consists of two parts, one of which was impossible at the time of making condition, yet it is a good condition, and the other part ought to be performed. *Cro. Eliz. 780*. See *supra*, page 133, note (b).

(s) See in what cases the non-performance of a condition shall be excused by the act of God, or act of law, *supra*, page 133, notes (a) and (b); and see *Com. Dig. Condition (L. 12.)* *Bac. Abr. Condition (Q.)* *Vip. Abr. Condition (G. c.)* to (K. c.)

3. By the act
of the parties.

A condition may be destroyed in the very creation of it; as if one devise lands for life, with express words of a condition, and not words of limitation, or words that may be so taken, the remainder over to a stranger; in this case the stranger cannot enter, neither is the remainder good, nor the condition effectual (t). Or it may be discharged, by matter *ex post facto*: as in the examples following.

Co. 2. 59. the
Lord Crom-
well's case.
Dier 309.
Co. super Lit.
265. 379.
Co. 10. 41.

• P. 158.

* If one make a feoffment in fee of land, upon condition, and after, and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land, to the feoffee, or any other; by this the condition is gone and discharged for ever. And yet if one grant a rent out of his land, upon condition, and after make a feoffment of this land, this doth not extinguish the condition. And if a fine in this case be levied in pursuance of a former agreement; as if one by indenture bargain and sell his land to another, and in the indenture there is a covenant that all other assurances shall be to the use of the bargainee, according to the first agreement, and the bargain and sale hath a condition annexed, that the bargainee shall make a feoffment of part of the land to the bargainor, and after the bargainor doth levy a fine to the bargainee in corroboration of the first bargain: in this case the condition is not extinct, but saved by the original agreement (u). And if one make a feoffment in fee of land upon condition, and after, and before the condition broken, he doth make a lease for years only of the land, or part of it, to the feoffee or any other; by this the condition is suspended for that time. And if the feoffor, after a feoffment made of land upon condition, enter upon all or part of the land, and be impleaded, and lose it; by this the condition is gone for ever. And if he enter and hold the possession only; by this the condition is suspended during his possession; and if he hold the possession so long that the feoffee cannot perform the condition; the condition is discharged for ever. And if one make a feoffment of land upon condition, and after, and before the condition broken, the feoffee doth make a feoffment of all or part of the land, to the feoffor; by this the condition is gone for ever. And if the feoffee make a lease for life, or years only, of part of the land (x); by this the condition is suspended for that time. But if the feoffee make a feoffment in fee, lease for life, or years to a stranger; this is no extinguishment nor suspension of the condition. And if the condition be to pay money, or do any such collateral thing; if in this case the feoffee make a lease to the feoffor, this doth not suspend the condition.

Co. 2. 59.
Perk. sect.
819, 820. 163.
Lit. Bro. sect.
212. Co. super
Lit. 219.

Co. 7. 14. 4. 58
Lit. Bro. sect.
212. 85.
Co. super Lit.
218.

Release.

If the feoffor, or lessor, release to the feoffee or lessee, Perk. sect. 823. Co. 1. 14

(t) This, it is presumed, is to be understood of cases where the remainder is made to depend on the condition. In the case, however, of wills, and also of deeds operating under the Statute of U the remainder would be good as an executory devise, conditional limitation, &c. But on the sub of conditional limitations, see note at the end of this chapter.

(u) But if a fine is to be considered in any other light than by way of further assurance, it w take away the right of re-entry.

(x) To the feoffor is to be understood.

Release
and Confirmation.

a. 2. 59.
wk. sect.
83. Co. 4.
19.

estate of the feoffee without condition, &c. by either of these means the condition is destroyed and gone for ever.

If one make a lease for life, or years, of land on condition, and after grant the reversion of part of this land; hereby the condition is destroyed for ever. And if he make a lease of part of it only; by this the condition is suspended.

wk. sect.
83. 764. 765.

A condition may be extinct, or suspended, by the intermarriage of the parties to the condition; as if a feoffment be made by a woman, on condition to pay ten pounds, or on condition to infeoff her by a day certain, and before the day they two do intermarry, and the marriage doth continue until after the day; in this case the condition is gone. And if the condition be to re-enter for non-payment of rent; the condition shall be suspended, and no rent be paid during the coverture.

* P. 159.

a. 4. 119. 5.
t. 2. 39. 714.
ter 309.

If a lease be made for years, on condition that the lessee or his assigns shall alien not without the licence of the lessor, and the lessor licence the lessee alone to alien, or licence him to alien a part of the land, or licence him to alien all the land for a time; or if the lease be to three on such a condition, and the lessor licence one of them to alien; in all these cases, the condition is gone for ever (y).

wk. sect.
K.

If one had infeoffed me, on condition that I should pay him ten pounds at Easter, and before the time he had entered into religion, and made me his executor, and had not been de-arraigned; in this case the condition had been gone for ever (z).

wk. sect.
L.

If I be seised of land in fee, and take a wife, and during the marriage infeoff a stranger on condition, and die, and the feoffee endow my wife of her third part; in this case the condition is not destroyed, and yet the third part is freed from the condition, but the reversion of that third part is not freed from the condition. And if she grant her estate again to the feoffee, the condition is revived. So if there be lord and tenant, and the tenant make a feoffment in fee upon condition, and the feoffee is attainted of felony, &c. so that the tenancy doth escheat; in this case the condition is not gone, but the tenancy is charged with it.

83. 64.
wk. Lit. 211.

If a feoffment or lease be made, rendering rent, on condition for non-payment a re-entry, and the feoffor, or lessor after the breach of the condition doth distrain, or bring an assise for the rent, or doth accept the rent at another day; hereby the condition is not destroyed, but it is discharged for that time; so that the feoffor, or lessor, cannot take any advantage of that breach: and if the act to be done by the condition be a collateral act, as not to alien, or the like, and the condition is broken, and the

See supra, page 126, note (c), on the subject of granting licences to assign.
A creditor making his debtor his executor discharges the debt at law. In the case however of assets to pay the testator's debts and legacies, a court of equity will enforce the payment of the debt which was due from the executor. See Toller's Executors and Administrators, 271. And in certain other cases (for which see Toller, ubi sup.) a creditor making his debtor his executor is no release of the debt in equity.

feoffor not having notice thereof, doth accept the rent; in this case also, and by this means, the condition is not discharged (a).

4. By the act of a stranger.

If one disseise the feoffee, or the heir of the disseisor, or any other that hath lands by a just title, and thereof infeoff a stranger on condition, and the land is lawfully recovered from him, by him that hath the title; hereby the condition is destroyed for ever. And if a disseisor make a feoffment in fee, on condition, and after the disseisee doth enter upon the feoffee on condition; this doth extinguish the condition. But if the disseisee release to the feoffee on condition; this release doth not discharge the condition. But if a disseisor make a lease for life, and the lessee for life make a feoffment in fee on condition, and the disseisee release to the feoffee of the tenant for life, by this * the condition in law is destroyed. And if the feoffee upon condition make a feoffment over, without condition, and the disseisee release to the second feoffee; by this the condition is destroyed, be the release before the condition broken, or after. And if the feoffee on condition make a lease for life, and the feoffor release to the feoffee on condition, or lessee for life, all conditions, or all demands to the land; by this the condition is discharged. And if the feoffee on condition make a feoffment to another on condition, and after, the first feoffor doth enter for breach of the condition; hereby the second feoffment, and the condition also, is gone for ever.

Lit. sect. 46,
477. Co. super
Lit. 277.

* P. 160.

Perk. sect.
823. 821.

If a man seised of land in fee, let it to a stranger for years, and one that hath no right doth oust the lessee, and thereof die seised, and his heir is in by descent, and he doth make a feoffment to a stranger upon condition, upon whom the lessee for years doth enter within the term, claiming his term; in this case the lessee shall hold the land discharged of the condition.

Perk. sect.
820.

And now we pass to a *covenant*, being another part of a deed (b).

(a) See more fully in what cases conditions shall be discharged by the act of the parties, *Bac. Ab.* Condition (Q. 3.) *Vin. Abr.* Condition (K. d.) *Com. Dig.* Condition (L. 4.); and see *supra*, page 12, latter part of note (q).

(b) The doctrine of conditional limitations having been frequently adverted to in the course of this chapter, it will here be proper to notice it somewhat more fully. Conditional limitations are generally speaking, conditions annexed to estates or limitations arising under the Statute of Uses and by force of such conditions, the estate or limitation to which the condition is annexed may be made to cease, and a limitation over may be made to take effect in possession, *without an entry made, or other act done, either by the grantor or any other person whomsoever*. This is the great leading line of distinction between a conditional limitation and a pure common law condition; which, as we have already seen, the grantor or his heirs can only, generally speaking, take advantage of, and that an entry or claim must be made in order to determine the conditional estate.

When we recollect that the Statute of Uses declares that he who has the use (or to whom the use is limited) shall have the *legal estate and possession*, and when too it is considered that a use limited to one person may upon a certain event or condition be made to cease, and a use to arise or spring up in favor of another, we shall immediately discover, that an estate under the statute (which is in fact a use) may be made to cease by virtue of a condition without any entry being made or any other being done in order to determine it; for where the use ceases, the estate into which the use was converted must cease also. And as the statute immediately converts the use, which, by virtue of the condition, arises or springs up, into an estate, and as such use (or estate) may be limited to any one, it appears that taking advantage of the condition is not (as in the case of a common law condition) confined to the party creating it or his heirs, but that any one to whom the use is limited may take advantage of the condition.

It may be proper to observe, that such estates or limitations as are commonly called future, shifting or secondary uses may, it is conceived, be ranked under the general denomination of conditional limitations. *Executory devises* too, where made to take effect upon any particular condition or event, may also, it is apprehended, be considered in the light of conditional limitations; for the right of devising being given by statute, the doctrine of the common law could not, properly speaking, be applicable to estates or interests created by will; therefore where a condition is annexed to such an estate, it may, in order to distinguish it from a common law condition, be properly called a *conditional limitation*.

It perhaps may not be improper to give a few instances of conditional limitations.

Thus in the case of (*Loyd v. Carew*, Prec. in Chan. 72. Show. Cas. in Parl. 137.) lands were conveyed by lease and release to the use of B. and C. for their lives, (upon their intended intermarriage) remainder to their first and other sons in tail male successively, remainder to the daughters of B. and C. in tail, remainder to the right heirs of C.; provided that if there should be no issue of B. and C. living at the decease of the survivor of them, and that the heirs of B. should within twelve months after the death of B. and C. dying without issue as aforesaid, pay to the heirs or assigns of C. £4000, then the remainder in fee so limited to C. should cease, and the lands should remain to the right heirs of B. for ever. Afterwards B. and C. for extinguishing all right and title of B. and her heirs under this proviso, levied a fine of the lands to the use of C. and his heirs. B. and C. died without issue, and the heir of B. filed a bill against the heir of C. to have a conveyance of the lands upon payment of the £4000 pursuant to the proviso. The bill was dismissed; but upon an appeal brought in parliament, the decree of dismission was reversed; upon its being alleged that the proviso was not void, it being within the reason of the limitations allowed in the Duke of Norfolk's case, where it is said, that future interests, springing trusts, or trusts executory, and remainders that are to arise upon contingencies, are quite out of the rule and reason of perpetuities, if they are not of remote consideration, but such as will speedily wear out, and that the fine could not bar the proviso because the same land never was, nor could be in B. who levied it.

Upon the above case, Mr. Fearne observes, that the new use to the heir of B., was not a limitation which could unite with that to the ancestor, according to the rule in *Shelley's case*; for it was not a remainder to arise upon the determination of the preceding estate, but was a *conditional limitation* of a future use; whereas that rule applies only to remainders; therefore the land vested in B.'s heir by purchase and not by descent.

And where a person devised lands to his mother for life, and after her death to his brother in fee; provided that if his wife (being then with child) be delivered of a son, that then the land should remain to him in fee. After the testator's death, a son was born; and it was held, that the fee of the brother should cease and vest in the son, upon the happening of the contingency.

A. devised lands to his wife for life, and after her death to his grand-child B. and the heirs of her body; provided always, and upon condition, that she married with the consent of D. E. and F. or the major part of them; and in case she should marry without such consent, or die without issue, then he devised the premises to C., (neither B. nor C. being heir to the testator). After the testator's death, B. married without the consent of any of the persons named for that purpose. It was held, that here was an estate tail devised to B., subject to two limitations, the one in law, viz. dying without issue; the other express and in fact, viz. marrying without such consent; which was properly a *conditional limitation*, and not a condition; for if it were a condition, it would descend to the heir at law, and he might enter for breach of it, and defeat the limitation over; and it was therefore agreed, that the marriage without consent determined her estate tail, and cast the possession immediately on C.

A person devised lands to A., his heir at law, and other lands to B. in fee; and that if A. molested B. by suit or otherwise, he should lose what was devised to him, and it should go to B. After the testator's death, A. entered on the lands devised to B., and claimed them. It was held, that this was a sufficient breach to give title to B., and that the condition imposed on the heir should not be taken as a condition; because, if so, by descending on him who alone could enter for the breach of it, it would, in this case, be fruitless and defeated: but it was held to be a *limitation*, which determined the heir's estate; and cast the possession on B. without entry.

The above cases may give the student some idea of the nature of a conditional limitation, but for more minute information on the subject, he should consult Mr. Fearne's Treatise on Contingent Remainders and Executory Devises, and Mr. Sanders on Uses and Trusts.

Before quitting the subject of conditions it may be proper to observe that the Court of Chancery will moderate the rigour of the common law, in respect to the breach of conditions in cases where compensation can be made and the other parties interested can be put in the same situation as if there had been no breach of the condition. It was formerly held, that a court of equity could only do this in the case of conditions subsequent and not in the case of conditions precedent, but this distinction is now exploded, and it is now settled, that the only point to attend to, is, whether a compensation can or can not be made and the other parties interested in the property placed in the same situation as if there had been no breach of the condition. Thus, where a person devised lands to his kinsman J. S., paying £1000 a-piece to his two daughters, who were his heirs at law: J. S. made default, and the two daughters recovered in ejectment. But upon a bill filed by the heir of J. S. to be relieved, and have the estate conveyed to him on payment of the principal and interest, it was so decreed, though in favor of a volunteer and to the disherison of the heir. *Burnadiston v. Fane*, 2 Vern. 366; and see *Wheeler v. Whitall*, 2 Freem. 9. *Woodman v. Blake*, 2 Vern. 222. *Bertie v. Falkland*, 1b. 389. *Cage v. Russell*, 2 Vent. 352. *Grimstone v. Lord Bruce*, 1 Salk. 156.

Where

Where, however, there is no clear ground on which to estimate the compensation, a court of equity will not relieve. Thus, where a man made a lease with a condition of re-entry if the lessee aliened or assigned it without licence. The lessee did assign without licence, and the court said this was a forfeiture against which it could not relieve, because it was unknown what should be the measure of the damages. See *Hill v. Barclay*, 18 Ves. 656, and cases there cited. So in the case of a forfeiture for non-performance of covenant to repair, it would appear that no relief can be afforded. See *Hill v. Barclay*, 16 Ves. 402, and 18 Ves. 656.

In the case of forfeitures for non-payment of rent, the act of the 4 Geo. 2. c. 28. s. 4. provides, that if the tenant at any time before the trial on ejectment, pays or tenders to the lessor, or pays into court all arrears of rent with the costs, the proceedings in ejectment shall cease. See 7 East. T. R. 363, and cases there cited. But before this statute, courts both of law and equity had exercised the power of restraining the lessor from taking advantage of the forfeiture, (or, in other words, had exercised the power of relieving the lessee) upon payment of the rent and costs. *Anon.* 1 Wils. 75. *Philips v. Doelittle*, 8 Mod. 345. *Smith v. Parks*, 10 Mod. 383. *Webber v. Smith*, 2 Vern. 103.

Although equity will relieve where compensation can be made, and the other parties interested in the estate can be put in the same situation as if there had been no breach of the condition, and by affording this relief will preserve the estate to the party breaking the condition, yet a court of equity will never go so far as to extend its assistance to a party as to vest the estate under a condition precedent, where it could never vest at law. 1 Vern. 83. 2 Vern. 333. 3 Ch. Ca. 129.

CHAP. VII.

OF A COVENANT.

Terms of the law, Plow. 308.

Terms of the law, tit. Covenant. Co. 4. 80. 5. 17. F. N. B. 145, 146. Dier 338. 237.

A COVENANT is the agreement or consent of two or more by deed in writing, sealed and delivered, whereby either or one of the parties doth promise to the other, that something is done already, or shall be done afterwards (a). And he that makes the covenant is called the covenantor; and he to whom it is made, the covenantee.

1 Covenant. Quid.

Covenantor. Covenantee. 2. Quotuplex.

And this is either express, or in deed, *i. e.* when the covenant is expressed in the deed: as when *A.* by deed doth covenant with *B.* to serve him for a year, and *B.* doth covenant with *A.* to pay him ten pounds for his service. Or it is implied, or in law, *i. e.* when the deed doth not express it, but the law doth make and supply it. As, when one doth make a lease for years by the words [demise or grant (b)] without any express covenant for quiet enjoying; in this case the law doth intend and make such a covenant on the part of the lessor, which is, that the lessee shall quietly hold and enjoy the thing demised against all persons, at least having title under the lessor, and at least during the lessor's life, and (as some think) during the whole term; and hereupon an action of covenant may be brought against him in the reversion; so that if the heir that is in by descent, put out the termor of his father, the termor may have * this action against him (c). A covenant is also either real, *i. e.* that whereby a man doth bind himself to pass a real thing, as lands or tenements; as a covenant to levy a fine of land, in which case the land itself is to be recovered; or when it doth run in the realty so with the land that he that hath the one, hath

* P. 161.

(a) A covenant is not a duty, nor cause of action, till it be broken; and therefore it is not discharged by a release of all actions: And when it is broken, the action is not founded merely upon the specialty, as if it were a duty, but savours of trespass; and therefore an accord is a good plea to it; and ends in damages. *Aleyn 39.*—See further as to the nature of a covenant, in *Gilb. Law of Covenants*, c. 1. and 2 *Bl. Com.* 304.

(b) As the words "*grant and demise*" contain an implied covenant on the part of the lessor, so the words "*yielding and paying*" amount to an implied covenant on the part of the lessee, and enable the lessor to recover his rent by an action of covenant or default. *Giles v. Hooper*, *Carth.* 135. *Iggulden v. May*, 9 *Ves.* 336.

(c) Where the covenant is created by law, the covenantee cannot bring an action of covenant, unless he is onsted by one who has a title; but it may be otherwise in case of an express covenant. 2 *Brownl.* 161. The distinction between implied covenants by operation of law and express covenants, is, that express covenants are taken more strictly. *Per Ld. Mansfield*, 3 *Burr.* 1639. *Ambl.* 250. See also *Lloyd v. Tomkins*, 1 *Durnf. & East*, 671. Implied covenants may be restrained or controlled by express covenants. Thus, if a lease for years is made by the words "*grant and demise*," and the lessor enters into an express covenant that the lessee shall hold and enjoy the land without the eviction of him (the lessor) or any claiming under him; here the lessor is not bound to answer in damages to the lessee under the implied covenant in case of eviction by a stranger, but only in case of eviction by the lessor himself, or those claiming under him. See *Noke's case*, 4 *Rep.* 88; and see also *Merril v. Frame*, 4 *Taunt.* 329.

OF

or is subject to the other, and so a warranty is called a real covenant. Or it is personal, *i. e.* when it doth run in the personality, and not with the land, but some person in particular shall have benefit by it, or be charged with it: as when a man doth covenant to do any personal thing, as build or repair a house, serve him, or the like (*d*). And these also are some of them said to be inherent, *i. e.* such as are conversant about the land; as that the thing demised shall be quietly enjoyed, shall be kept in reparations, shall not be aliened; or if it be to be sold, that the lessor shall have the first refusal (*e*); to pay rent, not to cut down timber trees, or do waste, to fence the coppices when they be new cut, to make further assurance, or the like. And some of them are said to be collateral, *i. e.* that are conversant about some collateral thing that doth nothing at all, or not so immediately, concern the thing granted; as to pay a sum of money in gross, to build a house in another man's ground, to make a feoffment or lease of other land, to give other security to perform the covenants, or to pay the rent, or that the lessor shall distrain for the rent in some other land than that which is demised, or the like; these are collateral covenants (*f*). There is also a covenant to stand seised of land to uses, which is now become a kind of conveyance of land; for which read *Uses* at large.

3. The use and operation of it.

A writ or action of covenant. *Quid.*

The most frequent use of a covenant is to bind a man to do something *in futuro*, and therefore it is for the most part executory; and if the covenantor do not perform it, the covenantee may have thereupon for his relief an action, or writ of covenant, against the covenantor, so often as there is any breach of the covenant. And this writ of covenant is therefore defined to be a writ lying where a man is bound by a covenant in a deed, and hath broken it. And in this case commonly the party damnified shall recover damages only for the breach: and if he have a judgment in an action brought for one breach, and after the covenantor doth break the covenant again; in this case he may bring a new action, and so for every breach (*g*).

But

Co. 1. 154.
Lit. Bro. sect.
309. 27 H. 8.
16. Plow. 308.
F. N. B. 145.

(*d*) What shall be a real, and what a personal covenant, see *Vin. Abr. (G. 2.) Bac. Abr. Covenant (E.) Com. Dig. Covenant (A. 2.) Gilb. Law of Covenants, 105.*

(*e*) A person entered into a covenant, that if he, his heirs or assigns, should have an advantageous offer for a certain parcel of his (the covenantor's) estate, that in such case the covenantee should have the refusal of it at five *per cent.* under the price offered. The covenantor sold his entire estate, including this parcel, without giving the refusal of such parcel to the covenantee; and it was held, that there was no breach of the covenant. *Collinson v. Lettsom*, 6 Taunt. Rep. 224. If the covenantor had only sold a very small part of his estate in addition to the parcel of which the covenantee was to have the refusal, in that case, it is presumed, there would have been a breach of the covenant; and selling the small additional piece would have been considered a contrivance to evade the covenant.

(*f*) As to collateral covenants, see 4 Burr. 2446. 2 Wils. 27, and *Lord Uxbridge v. Stoddard* 1 Ves. 56.

(*g*) Where a covenant is of such a nature, that there may be various breaches of it from time to time, it is adviseable to take a bond for the performance of the covenant, and the obligee (or covenantee), instead of having to bring a new action for every fresh breach, may resort to the aid of the 8 and 9 W. 3. c. 11. sect 8; which enacts, that in actions upon bonds for non-performance of covenants or agreements, the plaintiff may assign as many breaches as he may think fit, and the jury may assess, not only such damages as had theretofore been usually done in such cases, but also damages for such of the breaches assigned as the plaintiff shall prove to have been broken; and that if judg-

ment

But a covenant doth sometimes also make a transmutation Use. of a property and possession of things, as in case of a covenant to stand seised of land to uses, for which see *Use*. And in case where one doth covenant that another shall have a piece of land for five years; this is a good lease for five years, for which see *Lease*. And in case where one doth covenant with another, that if he pay him ten pounds such a day, he shall have all his cattle in *Dale*, or his lease for years he hath of the manor of *Dale*; in this case it seems if he pay the money at the time he shall have the property of the goods, and of the lease for years. It is said therefore that in some cases upon the writ of covenant the party shall recover the land itself out of which he hath been ejected.

Lease.

Contract.

* P. 162.

Plow. 330.
27 H. 8. 16.

* F. N. B. 145.
G. Co. 3. 63.
Ewer's case,
8 Jac.

* Lit. Bro.
sect. 450. Co. 2.
Ld. Cromwell's
case. Dier 57.
150. 21 H. 7.
37. 40 E. 3. 5.

A covenant may be in the affirmative, or in the negative (*h*). And it may be executed, *i. e.* that a thing is done already; or executory, *i. e.* that a thing shall be done hereafter (*i*); and these are all good. But if it be of a thing present, as if I covenant that my horse is yours; this is void. * And these covenants being made by a deed poll are as good and effectual, as when they are made by a deed indented, so as the party have the deed to shew; for otherwise a common person cannot have an action of covenant; for it doth not lie upon a verbal agreement, neither can it be grounded without a writing, except it be by a special custom, as in *London* (*k*). ^b And there needs not in this case formal and orderly words, as covenant, promise, and the like, to make a covenant on which to ground an action of covenant (*l*); for a covenant may be

4. What shall be said a good covenant in a deed, upon which an action of covenant may be had: and what not.

1. In respect of the manner of making it,

ment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff, upon the roll, may suggest as many breaches of the covenants or agreements as he may think fit, upon which a writ shall issue to the sheriff to summon a jury to appear before the justices of assize, to inquire of the truth of the breaches, and to assess the damages the plaintiff shall have sustained thereby; and upon the damages being satisfied, execution shall be stayed, or the defendant discharged from the execution, as the case may require; but the judgment shall still remain as a further security to answer the plaintiff such damages as may be sustained by further breaches of the covenants or agreements; and upon such further breaches the plaintiff may have a *scire facias*, upon the judgment against the defendant, suggesting other breaches of the covenants, and summon him to shew cause why execution should not be awarded upon the judgment; upon which the like proceedings shall be had for assessing the damages as before mentioned; and so from time to time as often as there shall be occasion.

(*h*) As to affirmative and negative covenants, see Vin. Abr. Covenant (D. a.) and 1 Wood. 356.

(*i*) Covenants are generally *executory*; and the most important of such executory covenants are those which relate to the sale and purchase of lands; for though such covenants are generally called contracts or agreements, yet where entered into in writing (as they must be by virtue of the Statute of Frauds), and are under seal, it is apprehended they do not improperly fall under the denomination of *covenants*. The limits of a note, however, will not well admit of more than a mere general notice of a subject so copious; and for more particular information upon it, Mr. Sugden's valuable work on Vendors and Purchasers should be consulted. It may be proper, however, just to observe, that with respect to such executory covenants, it is usual where there is a breach of them, for the covenantee not to bring an action at law, where he would only recover damages, but to file a bill in equity for a specific performance of the covenant or agreement.

(*k*) Or by the custom of any other place; though such custom shall be taken strictly. 1 Leon. 2.

(*l*) Any words, which shew the party's agreement to the performance of a future act, being effectual for that purpose. 1 Leon. 324. 1 Ch. Ca. 294.—The word *covenant* is not necessary to make a covenant. 1 Roll. Abr. 518.—No particular technical words are requisite towards making a covenant. 1 Burr. 290. 1 Ves. 516. In any instrument under seal, any expression importing that something is to be done, as "it is agreed" "it is declared" "it is understood," &c. would amount to a covenant, and bind the party who was intended to do the act. *Hollis v. Car*, 2 Mod. 86. *Harwood v. Hilliard*, 2 Mod. 268. So if by articles of agreement it is said, that it is intended a fine shall be levied, this

had by any other words; and upon any part of an agreement in writing, in what words soever it be set down, for any thing to be or not to be done, the party to or with whom the promise or agreement is made may have this action upon the breach of the agreement. And therefore if these words be inserted in a deed amongst other covenants [that the lessee shall repair, provided always that the lessor shall allow timber; or that the lessor shall skowre ditches, provided always that the lessor do carry away the earth;] these are good covenants on both sides.

And if a lease be made of houses by patent to *I. S.* for twenty-one years, and therein is inserted this clause [and that the said *I. S.* and his assigns shall repair the houses when they shall be decayed;] this is a good covenant. And so also it is where these or the like words be inserted amongst other covenants [and that the lessee shall pay ten shillings a-year rent, or that the lessee shall not alien (a),] these shall be said to be covenants, unless it be in such cases where there is some other means to enforce the doing of the thing. As if in case of the rent there be a clause of distress, re-entry, or *nomine pene*. And in all cases regularly where words that do begin the sentence be conditional, and have the effect of a condition, and do give another remedy, there they shall not be construed to make a covenant, as in the cases of condition before. And yet if words of condition and words of covenant be coupled together in the same sentence, [as provided always, and it is covenanted, or the like;] in such cases the words may be construed to make a covenant and a condition both.

* Adjudged Pasch. 14 Jac. B. R. Sir Thomas Bret versus Cumber-land's.

Bro. Covenant 21. 26. & Co. & Dier ubi supra.

Lease.

* P. 163.

If a man make a lease for life by indenture, and therein are inserted these words [it is provided that if the lessee die within sixty * years, that then his executors and assigns shall have the land until the sixty years be ended, to be accounted from the date of the indenture;] this albeit it be not a good lease, yet it is a good covenant.

Dier 150. Co. 1. 135.

If a man make a lease for years, and warrant it to the lessee, his heirs and assigns, during the term; or he that hath right to the land confirm the estate of the lessee for years with warranty; in these cases, howbeit this be not a warranty, nor in the nature of a warranty, yet it shall be construed a good covenant in law for the quiet enjoying of the thing (o).

Bro. Covenant 38. Descend 38 21 H. 7. 32.

If the lord grant to his tenant, that he will not distrain him in such a part of his land for his rent; this shall be taken to be a good covenant, by this word [grant] (p).

Perk. sect. 61

amounts to a covenant to levy it. 2 Mod. 91. So also in an indenture of apprenticeship, there are not usually inserted the formal words of a covenant, but only an agreement that such things shall be done by the parties. 1 Roll. Abr. 519. Gilb. Covenant, 14.

(a) See supra, page 123, note (q), on the subject, or restraining lessee from assigning or underletting; and see infra, page 164, note (y).

(o) A warranty does not extend to any term of years however long it may be, or to any other chattel interest in lands; (Co. Litt. 398 a.) but where a person warrants such interest, the party to whom the warranty is made, may have an action of covenant, or on the case.

(p) See more fully by what words an express covenant may be created, Vin. Abr. Covenant (C) Bac. Abr. Covenant (A.) Gilb. chap. 2.

A covenant

See West.
Symb. in his
first part totq.
& infra. Plow.
308. 302.
27 H. 8. 16.
Dier 15. 344.
253. 251. Fitz.
Covenant 1.

A covenant to do any thing that for the substance and matter of it is lawful, or not to do any thing that for the matter of it is unlawful, is good: as if the grantor covenant that he is seised or possessed of a good estate of and in the thing he doth grant, and hath power to grant it. That the grantee shall quietly enjoy it. That it is and shall be free from incumbrances. That he will make further assurance if need be (g). That if the grantee be evicted, he shall pay no rent. That the grantee shall pay rent. That he shall discharge all dues, and save and keep harmless the grantor. That he shall not alien the thing granted (r); or, if he do, that the grantor shall have the first refusal thereof (s). That he shall not do waste. That he shall have houseboot, and hayboot. That the grantor or grantee shall repair the old housing, or build new. That he shall pay and discharge all rents and payments issuing out of the land. That he shall not fell trees; or, if he do, that he shall pay to the grantor so much in money for every tree. That if he fell any underwood, he shall fence it. That he shall make an estate of land. That he shall be quit of any suit, service, or payment. That he shall give sufficient security to *I. S.* for an hundred pounds he doth owe him; all these, and the like covenants, are good. And generally where a condition for the matter of it is good, a covenant comprehending the same matter is good also. But if the matter required to be or not to be done by the covenant, be, for the substance thereof, unlawful, then is the covenant void, and doth not bind: and therefore if one covenant to kill or rob a man, or the like; this covenant is void. So if one covenant that he will maintain another in his suits, or that he will not appear in inquests, or that he will break the peace, or that he will forestall corn, or the like; these covenants are void. So if one be tenant in fee-simple of land, and he covenant that he will not alien it; this covenant is void (t). So if a man be a tradesman, and he covenant that he will not use or exercise his trade; this restraint, if it be absolute and continual, is void; but if it be *sub modo* only, as that he shall not use his trade at one time, or in one city or town only, * this covenant may be good (u). So if a man be by covenant restrained to sow the land which hath been used to be sowed, and this be either absolutely, or *sub modo*, i. e. that if he sow it he shall pay thus much an acre for it; these covenants have been held to be void. *Sed quare* how the law is now, for it seems the statute of 39 *Eliz. c. 2.* is discontinued (w). If *A.* owe money to *B.* and

2. In respect of the matter or substance of it.

See Condition, Num. 7.

See Conditions against law. Num. 7. Dier 6.

Against law.

18 Jac. B. R. Jolliffe versus Broad, Pasch.
20 Jac. B. R. Tanner versus Brag.

* P. 164.

20 Jac. B. R. Mairé

(g) The above is the chain of covenants usually entered into by vendors with purchasers; but see more fully on the subject, infra, page 177, note (d).

(r) See supra, pages 120 and 123, notes (l) and (q), on the subject of restraining alienation by condition; for wherever a condition in restraint of alienation is bad, there it is conceived a covenant in restraint of it is equally bad: see next page, note (y).

(s) See supra, page 157, note (e).

(t) See supra, pages 129 and 130, notes (p) and (a).

(u) Not good, it is conceived, unless the party received a consideration for entering into it; see supra, page 129, note (k).

(w) This act was for "the maintenance of husbandry and tillage." It enacted, that all land conveyed

Impossible.

and *B.* owe money to *C.* and *B.* doth make a letter of attorney to *C.* to sue *A.* at his own charge, and *B.* doth covenant with *C.* that he will not release the debt to *A.* in this case albeit this be maintenance in *C.* to sue at his own charge, yet this is a good covenant, and not against law. So also if a dean and chapter, or the like, covenant to renew a lease contrary to the meaning of the statute of 18 Eliz. c. 11. it seems this is a good covenant (x). And if the thing to be done by a covenant be in the nature of it impossible, the covenant is void. And therefore it is, that if a man covenant to go to *Rome* in three days, or the like; the covenant is void. So if a man covenant to make a feoffment to his wife; this covenant is void. But if a man covenant to make a good estate of land to her in fee-simple, or otherwise, or to find her maintenance, or to give her so much by the year; these are good covenants. And generally, where the matter being in a condition will make the condition void because it is against law; there it being in a covenant will make the covenant void (y).

versus Stapleton.

Trin. 14 Jac.
Co. B. Tailor's
case.
27 H. 8. 27.
4 H. 7. 4.

See Condition,
Num. 7.

If

verted from tillage to pasture since the 17th November, 1 Eliz. having been used for tillage twelve years before the conversion, should be restored to tillage before the 1st of May, 1599.—The act is not inserted in *Hawkins, Ruffhead's*, or *Pickering's* edition of the statutes, being marked to be expired, but it is contained in *Rastell's*.—The preamble is curious, and not unworthy attention.—It recites that the strength and flourishing estate of this kingdom hath been always and is greatly upheld and advanced by the maintenance of the plough and tillage, being the occasion of the increase and multiplying of people, both for service in the wars, and in times of peace, being also a principal means that people are set on work, and thereby withdrawn from idleness, drunkenness, unlawful games, and all other lewd practices, and conditions of life; that by the same means of tillage and husbandry, the greater parts of the subjects are preserved from extreme poverty, in a competent estate of maintenance and means to live, and the wealth of the realm is kept dispersed, and distributed in many hands, where it is more ready to answer all necessary charges, for the service of the realm; and that husbandry and tillage is a cause that the realm doth more stand upon itself, without depending upon foreign countries, either for bringing in of corn in time of scarcity, or for vent and utterance of our own commodities being in over great abundance. There can be little doubt, however, but the above act is to be regarded as obsolete, the universal practice having long been for every man to have his estate in pasture or tillage just as he pleases, and to enter into what stipulations he thinks fit with his tenants in this respect.

(x) Query of this, as the act expressly says every such covenant shall be void and of no effect.

(y) We have before seen in what cases conditions in restraint of alienation are void; and there can be no doubt but covenants which have for their object a similar restraint upon alienation would be equally void, at least at law; that is, that no damages would be given in an action for breach of the covenant. There is no doubt, however, but a covenant in restraint of alienation is good, wherever a condition in restraint of it would be good; as in the case, for instance, of a covenant on the part of the lessee not to assign, or not to assign without licence. See *supra*, pages 123 and 126, notes (q) and (e). In no case, however, would a covenant, like a condition, have the effect at law of actually restraining alienation: it would merely subject the covenantor to answer in damages in case of a breach of the covenant. But though at law, such a covenant will not amount in any case to a positive restraint upon alienation, yet there are cases in which, it is conceived, the Court of Chancery would enforce a specific observance of the covenant, by restraining the party from alienating the property to which it related. For instance, covenants are sometimes entered into in marriage settlements by persons seized of estates tail, that they will not bar the entail, or (which amounts to the same thing), that the estate shall descend according to the uses of the settlement creating the entail. Though a condition to restrain tenant in tail from destroying the entail by means of a fine under the statute, or by a recovery, is, as we have already seen, absolutely void; yet it is clear that the breach of a covenant not to bar an entail, if such covenant was entered into for a valuable consideration, would subject the covenantor to damages in an action at law; and the question is, whether a court of equity, with a view to secure the estate to the issue of the marriage, would not enforce a specific observance of such a covenant? Where it does not appear, that the parties intended to rely on the security which the covenant afforded at law, there, it is apprehended, a court of equity would enforce a specific observance of it. *Lord Peterborough's case*, (cited 1 P. W. 105); and the cases of *Flight v. Cooke*, (2 Ves. 619), and *Legard v. Hodges*, (1 Ves. jun. 478. 3 Bro. C. C. 531. 4 Bro. C. C. 491. and see *Freeman v. Freeman*, 2 Vern. 233. *Jervis v. Burton*, *ibid.* 251.) seem to warrant this opinion. In *Lord Peterborough's case*, a tenant for life, with a power to make leases, entered into a covenant not

Dier 19. 115.

If a lessor covenant with his lessee, that he shall and may have houseboot, hayboot, plowboot, &c. by the assignment

to exercise the power: Notwithstanding the covenant he *did* exercise it. But upon a bill brought for that purpose, the court *set aside* the leases. [Though the fact does not appear in the report of the case, yet it must be taken for granted, that the lessees had notice of the covenant.] And in the case of *Flight v. Cooke*, the husband on his marriage, covenanted that in case his wife survived, she should have the sum of 100*l.* South-sea annuities, and also the sum of 100*l.* which was secured to the covenantor by a promissory note of *J. B.* The wife filed a bill to have these sums secured, and the Master of the Rolls, after observing that the covenant related to a specific thing, ordered that the husband should either give security to the Master's approbation, or in default of doing so should pay the money into the bank.

The last is a pretty strong authority in favor of the opinion—that a court of equity will enforce a specific observance of a covenant *not to bar an entail*. And the case of *Legard v. Hodges* also strongly favors it. In that case Mr. *Hodges* covenanted in his marriage settlement, to pay one-third of the yearly rents of his estates to trustees in order to raise a fund of 10,000*l.*, and Lord *Thurlow* held, that the covenant created an *equitable lien* upon the estates, and affected all those who had notice of it.

Though it is true none of the cases just noticed come directly up to the point we are considering, yet there is certainly as strong a reason, why a court of equity should enforce a specific observance of a covenant *not to bar an entail*, as to enforce a specific observance of a covenant, not to exercise a leasing power—as strong a reason to enforce a specific observance of a covenant not to bar an entail, as there is to enforce a specific observance of a covenant to leave a wife a specific sum of money;—as strong a reason to contend that a covenant not to bar an entail is an *equitable lien* upon the estate, as that a covenant to pay a certain proportion of the rents is an *equitable lien*. Lord *Peterborough's case*, and the cases of *Flight v. Cooke*, and *Legard v. Hodges*, therefore certainly seem to warrant the conclusion that a court of equity would enforce a specific observance of a covenant *not to bar an entail*. [The cases of Lord *Warrington v. Langham*, (1 Eq. Ca. Ab. 132. Colles's Sup. to Bro. P. C. 149.) and *Beville v. Brander*, (1 P. Wms. 460.) do not at all, it is apprehended, militate against this opinion; for the covenant in these cases did not relate to any thing specific, but only to the payment of a gross sum of money.] If therefore a court of equity would enforce a specific observance of such a covenant, it would consequently compel the covenantor (at the expence of the parties interested in the covenant) to suffer a recovery and reduce himself to a *mere tenant for life*, with remainder to his children in tail. And this can be the less doubted, supposing the covenant is to be considered (as it is conceived it must) as creating an *equitable lien*; for it is well known, that wherever the land is bound in equity, that there a court of equity will compel the owner to render the claim available at law.

In opposition to the opinion, that a court of equity will enforce a specific observance of a covenant not to bar an entail, it may perhaps be objected, that the very fact of destroying the subsisting entail and re-settling the estate, would be a *breach* of the covenant. This objection however could have little weight in a court of equity, which looks at the spirit and intention of an agreement, and not at the language or form of words in which it is drawn up. Besides, as no one would sustain an injury by such a breach, no one could maintain an action upon it; therefore such an objection could be of no weight either in a court of law or equity.

It will here be proper to notice the case of *Collins v. Plummer*, (1 P. Wms. 104. 2 Vern. 635. 2 Eq. Ca. Ab. 36.) lest from hastily considering it, it should be thought to decide that a specific observance of a covenant *not to bar an entail*, cannot be enforced in equity.

In the case of *Collins v. Plummer*, a man upon his marriage settled his estate upon himself for life, with remainder to his intended wife for life, with remainder to the heirs of his body by his wife, with remainder to himself in fee; and in the same deed he entered into a covenant *not to bar the entail*; but that the issue of the marriage should enjoy the estate according to the limitations. There was issue of the marriage an only daughter. The father suffered a recovery, and devised the estate to trustees in trust for his daughter for life, with remainder to her first and other sons in tail. After the father's death the daughter and her husband brought a bill against the trustees under the father's will, for a specific performance of the covenant. The Lord Chancellor however dismissed the bill; but one of his Lordship's reasons for doing so appears to have been, that he considered the deed as clearly shewing that the intention was, that the parties should rely on the father's covenant; meaning, it is presumed, that they should rely on the security it afforded at law. Taking it for granted that this was his Lordship's meaning, it is evident that the case of *Collins v. Plummer* is no authority in cases where such does not appear to have been the intention. Where indeed it evidently appears that the parties intended to rely upon the security which the covenant afforded at law, there a court of equity would certainly have no ground on which to enforce a specific observance of it, and compel a re-settlement. But the case, it is conceived, ought to be extremely clear to justify the court in refusing its interference. As to supposing that the parties intended to rely upon the security afforded at law, the cases above noticed pretty evidently shew that the court will not do that. Another reason which seemed to influence his Lordship was, that by giving the estate to the daughter for life, the intent of the settlement was more effectually answered than it would have been if it had descended to her in tail. But this reason (supposing

signment of the bailiff of the lessor; this is a good covenant: and yet it seems it doth not restrain the power that the lessee hath by the law to take these things without assignment. But if the lessee do covenant that he will not cut any timber, or fuel, without the leave, or without the assignment of the lessor; this is a good covenant and doth restrain him; for in this and such like cases the rule is, *modus & conventio vincunt legem*.

If an obligee covenant with the obligor, that he will not sue him upon the obligation until Easter following; this is a good covenant, but no release, or suspension of the debt.

† If there be lord and tenant of three acres of land, white acre, and two others, and the lord grant to the tenant by deed that he will not distrain in white acre for his rent or services; this is a good covenant, but doth not determine the seigniority.

If a man grant a mill within his manor, and covenant for him and his heirs, that there shall be no other mill set up within the manor; it seems this is a good covenant.

If one make a lease wherein are divers covenants to be performed on the part of the lessee, and after the lessee doth covenant, that if any of the covenants be broken, that the lessor shall enter upon the land demised, and hold it until the lessee make him * amends for the damage done by the breach of the covenant; it seems this is a good covenant, and that the lessor may take advantage thereof accordingly (z).

If a man, seised of land in fee, covenant to stand seised of it to uses, and no estate doth rise by the covenant; yet this may be good by way of covenant, and give remedy to the covenantee in an action of covenant. But with this difference. If the covenant be future, as where one doth covenant with another, that in consideration of a marriage, his lands shall descend, remain, or revert to

Mich. 36.
37 Eliz. Co. B.
Adjudged
Deaux v. Jefferies, 21 H. 7.

23.
† Perk. sect.
69.

Fitz. Covenant
5.

Fitz. Covenant
S.

Plow. 307,
308. 21 H. 7.
18. 27 H. 8.
16. Finchesley 49.

* P. 165.

(supposing it should in any case have any weight) cannot possibly apply in cases where a bill is filed for a specific performance against the covenantor himself; and which is most probably done with a view to prevent his alienating his estate. And besides these reasons, his Lordship laid some stress upon the circumstance of the covenant, not to bar the entail, being in the same deed which created the entail; which his Lordship observed, distinguished the case before him from *Lord Peterborough's case*. It might perhaps be the last noticed circumstance which induced his Lordship to think, that the parties intended to rely on the security which the covenant afforded at law. But however this may be, it is certain that such a reason cannot be brought forward, where the deed creating the entail, and the deed containing the covenant are not the same; nor perhaps even where they are the same, if the deed is ill drawn, so as to afford reason for thinking that the person who drew it did not know the distinction between a strict settlement and an estate-tail.

Upon the whole, the case of *Collins v. Plummer* can only, it is conceived, be considered as an authority where it evidently appears that the parties intended to trust to the security which the covenant afforded at law.

If the opinion is well founded, that a covenant not to bar an entail constitutes an equitable lien on the estate, except where it is clear that the parties intended to rely on the security which the covenant afforded at law, it follows of course, that a purchaser with notice of the covenant would be bound by it. See *Lord Peterborough's case*, and *Legard v. Hodges*, ubi sup. The Editor has entered the more fully into the above subject, as such covenants are sometimes entered into in marriage settlements: it would however be much more advisable to suffer a recovery and re-settle the estate.

(z) Query whether this is not rather in the nature of a condition of re-entry, than a mere covenant; for if it is to be considered merely as a covenant, the lessor could only obtain damages in an action for the breach of it, and not maintain an ejectment.

his

his son and heir apparent, and to the heirs of his body, on the body of his wife; in this case the covenantee may have a writ of covenant, upon the covenant (a). For if a covenant be present, as that a man and his heirs shall from henceforth stand and be seised to such and such uses, and the uses will not arise by the law in the case; in this case no action of covenant will lie upon this covenant (b): for this action will never lie upon any covenant, but upon such a covenant, as is either to do a thing hereafter, or that a thing is or hath heretofore been done; and not when it is for a thing present, as when A. doth covenant with B. that his black horse shall be for ever after the horse of B. this is no good covenant to give the horse to B. or to give him an action of covenant for him, but A. may keep him still notwithstanding.

Agreed & Car.

If one mortgage upon condition to re-enter upon payment of an hundred pounds at a day, and the mortgagee doth covenant that he will not take the profits of the land until default of payment; this is a good covenant, and the mortgagee therefore may not meddle with the profits until the day of payment come.

Co. 4. 80. 5.
17. Trin.
3 Jac. B. R.
Stile's case.
Pasc. 7 Jac.
B. R. Winse-
combe's case.

If one make a lease for years of land by the words [demise or grant,] and there is not contained in the lease any express covenant for the quiet enjoying of the land; in this case the law doth supply a covenant for the quiet enjoying of it against the lessor, and all that come in under him by title, during the term; and upon this the lessee, his executors, administrators, or assigns, may have an action of covenant if he be disturbed. But where there is an express covenant in the deed for the quiet enjoying of the land, there the law will not make this implied covenant (c). *Expressum facit cessare tacitum*. And therefore herein this is not like to the case, where a man doth make a lease for life by the words of *dedi & concessi*; or make a lease for life by other words reserving rent; (in which cases the law doth create a warranty against all men during the life of the lessor); for if in these cases there be an express warranty in the deed, yet this doth not take away nor qualify the implied warranty; but the lessee may make use of which of them he will, if he be ousted or evicted by one that hath an elder title (d).

5. What shall be said a good covenant in law, upon which an action of covenant may be had: and what not.

Warranty,

Plew. 287.
See in Expo-

A covenant in particular (being one part of a deed) is subject to the general rules of exposition of all parts of

P. 166.

6. How a co-

(a) And it is conceived that a court of equity would in such a case give specific effect to such a covenant. See last page, latter part of note (y).

(b) In order to create a good covenant to stand seised to uses, it is necessary that the covenantor should be seised at the time of making the covenant; that the covenant should be by deed, and not by parol; that it should contain apt words and a manifest intent; and that it should be made on sufficient consideration, otherwise no use will arise. See fully post, in the chapter on Uses.—Com. Dig. Covenant (G.) 1 Wood, 647. Vin. Abr. Uses (B. a.) (Z. a.) But where a covenant to stand seised is entered into for a valuable consideration, and the use should happen not to arise at law, the Court of Chancery would compel the party, by a valid conveyance, to give effect to the intention.

(c) See supra, page 160, note (c).

(d) See further as to covenants created by implication of law, and in what cases action of covenant may be had thereon, Vin. Abr. Covenant (G.) Com. Dig. Covenant (A. 4.) Warranty (A.) Bac. Abr. Covenant (B.)

deeds

venant in deed or law shall be taken and expounded: and how it shall be performed.

deeds in general, as: 1. To be always taken most strongly against the covenantor and most in advantage of the covenantee (e). 2. To be taken according to the intent of the parties (f). 3. *Ut res magis valeat, &c.* 4. When no time is limited for the doing of the thing, it shall be done in reasonable time, and the like (g).

Joint and several.

In cases where the covenantees have, or are to have, several interests or estates, there, when the covenant is made to and with the covenantees, & *cum quolibet eorum, aut altero eorum*; in this case these words make the covenant several: as, if one by indenture demise black acre to A. and white acre to B. and green acre to C. and covenant with them and either of them, or covenant with them and every of them, that he is lawful owner of all these acres; in this case the covenant is several: but if he demise to them the three acres together, and covenant in this manner; the covenant is joint and not several. And if A. and B. do covenant jointly, and severally: in this case the covenant may be joint, or several, and the covenantors may be sued either the one way, or the other, at the election of the covenantee (h).

For quiet enjoying.

If one make a lease of land to another, and covenant that he shall quietly enjoy it without the let of any person whatsoever, or without the let of any person whatsoever, claiming by or under the lessor; in both these cases the covenant shall be taken to extend to such persons as have title, or claim some estate under the lessor: for if in the first case any person that hath no title, and in the second case any person that shall claim under another, and hath title, or that shall claim under the lessor, claim, or enter, or otherwise disturb the lessee; this is held to be no breach of the covenant. *Sed quere* of the first case: for herein some conceive a difference between a covenant in

Co. 5. 19.
Dier 338.
Bro. Covenant
49.

F. N. B. 143. l.
Dier 328.
26 H. 8. 3.
Mich. 7 Jac.
B. R. accord
in Gamble's
case.

Co. 4. 80.
Dier 328. Per

(e) As if A. covenants with B. that if B. marries his daughter he will pay him 20l. per annum, without saying for how long, yet it shall be for the life of B. and not for one year only. 1 Lev. 102. See further Bac. Abr. Covenant (F.)

(f) See accordingly Sir T. Raym. 464.

(g) How a covenant shall be expounded with regard to the context, or in the case of synonymous covenants, see *infra*, page 177, note (d), and also see Com. Dig. Covenant (D.) Vin. Abr. Covenant (L. 4.)

(h) Words, though never so joint, shall be taken severally, where they have a distinct subject-matter to work upon; per Holt, Ch. J. 3 Ch. Rep. 126. Where two lessees covenanted jointly and severally at the beginning of the lease, it was held that the words "jointly and severally," extended to all the subsequent covenants, notwithstanding the intervention of covenants on the part of the lessor. See *Duke of Northumberland v. Errington*, 5 T. R. 522. Where a covenant is entered into by two or more jointly and severally, the covenantee may either bring a joint action against all the covenantors or a separate one against each of them. And in the case of joint and several covenants, the circumstance of one of the covenantors being under age does not exempt the other from his liability on the covenant. See 4 Taunt. 10. As covenantors may subject themselves jointly and severally to the burden of a covenant, so two or more covenantees may jointly and severally have the benefit of a covenant. As where a person covenants with two or more persons and each of them; here, if the covenantees take several interests or estates in the thing to which the covenant relates, the covenant is clearly several, and each of the covenantees alone may sue upon it; but it is held, that where the interest of the covenantees is joint, the circumstance of the covenant being with "each of them," does not make it a separate covenant: *Anderson v. Martindale*, 1 East, 497. *Slingby's case*, 1 Rep. 119. and *Duke of Northumberland v. Errington*, *ubi sup.* *Southcote v. Hoare*, 3 Taunt. 89. See fully as to joint and several covenants, 1 Wood 537. Gilb. Covenant, 99. Bac. Abr. Covenant (D.) and the case of *Enys v. Donnithorne*, 2 Burr. 1190.

deed,

Furner at Lent
Assise, Glouc.
23 Car.

deed, and a covenant in law: and that howsoever the covenant in law is extended only to evictions by title, yet that the covenant in deed shall be extended further. And therefore that if *A.* make a lease for years to *B.* and doth covenant that *B.* shall quietly enjoy it during the term without the interruption of any person or persons; that if a stranger in this case that hath no right doth interrupt *B.* that he may have an action of covenant (i): as when such a promise is by word, an action of the case will lie upon it (k).

Curia Jervis v.
Peade, Mich.
40. 41 El.
B. R.

And if the lessor covenant with his lessee, that he hath not done any act to prejudice the lease, but that the lessee shall enjoy it against all persons; in this case these words [against all persons] shall refer to the first, and be limited and restrained to any acts done by him, and no breach shall be allowed but in such an act (l).

Co. 5. 17.
22 H. 6. 52.
Co. 4. 80.
Dier 257.

The covenant in law upon the words, demise or grant, also for * the quiet enjoying of the thing demised, is general against all persons that have title during the term, and extendeth to the heir after the death of the lessor, as against himself only, and shall charge the executors or administrators for any disturbance in the life of the covenantor, but not for any disturbance afterwards; he that doth sue therefore upon this covenant, must shew that he was molested or evicted by one that had an elder title.

* P. 167.

Co. 5. 78.

If one doth covenant to enter into bond for the quiet enjoying of land, and doth not say what bond; in this case it shall be taken to be a bond of so much as the land to be enjoyed is worth.

Fitz. Covenant
21. see before.
7 E. 4. 6. Bro.
Grant, 164.

A warranty in a lease for years shall be taken for a covenant for quiet enjoying.

If one covenant with another to acquit him of all charges issuing out of the land, and after by parliament the tenth part of the value, out of the issues of all lands, are given to the king; in this case it seems the covenant shall not extend to this. But if the parliament had given the tenth part *exitum terræ*; the covenant would have extended to this as well as to rents, commons, and such like things, wherewith the land is charged.

To free from
incumbrances
and charges.

Co. 5. 19.

If *A.* covenant with *B.* to make such assurance, or such further assurance of land as the counsel learned in the law of *B.* shall advise; in this case albeit *B.* be learned in the law himself, yet he may not devise this assurance, but

To make as-
surances of
land.

(i) Though it was formerly held, that an unqualified covenant for quiet enjoyment, extended to every eviction, as well by persons without title as by those who had title, (*Mountford v. Catesby*, Dyer 328.) yet it seems now to be settled, (and it is conceived properly) that such a covenant shall not extend to a tortious eviction, or eviction by a person without title; for if the purchaser is tortiously evicted he does not thereby loose the estate, for he has his remedy at law and may recover the property. *Dudley v. Polliot*, 3 T. R. 584. *Noble v. Smith*, 1 H. Blackst. 34. and see 2 Saund. Rep. by Williams, 178 a. note 8. and 181 a. note 10. But where the covenant is for quiet enjoyment against a particular person by name, there it is held that the covenant extends even to a tortious eviction by such person. *Haynes v. Rickerstaffe*, Vaugh. 118. *Forster v. Mapes*, Cro. Eliz. 212. 1 Rol. Abr. 430, pl. 13.

(k) See last note.

(l) For the construction of the words in a covenant notwithstanding any act done by the covenantor, &c. See Vin. Abr. Covenant (T.) Cro. Jac. 233. *Proctor v. Johnson*, and also see infra, page 168, note (q), as to the dependancy and independancy of covenants.

some other learned in the law must advise, otherwise *A.* is not bound to make it (*m*).

And if *A.* covenant with *B.* to make such assurance of land by a day, as *B.* or his heirs shall devise; in this case *B.* or his heirs must first devise the assurance, before *A.* is bound to do any thing. And therefore if one sell land for money, and the vendee doth covenant to make back to the vendor and his heirs, such assurance of the land as the counsel of the vendor shall devise, within one year, provided that if the vendee make default in the assurance, then if he do not pay twenty pounds to the vendor, that then the vendee shall stand seised to the use of him and his heirs; and the vendor tender no assurance, and the twenty pounds is not paid; in this case the land is in the vendee freed from the covenant. And therefore in these and such like cases, where a man is to make such assurance, as *A.* or his heirs, or their counsel shall devise; *A.* or his heirs must take care that in time they have an assurance reasonably drawn and ready to be sealed, and to tender it to him that is to seal it, for until then there can be no breach of covenant (*n*). But if *A.* be bound to make a feoffment, lease, or other assurance of land to *B.* by a day; in this case *B.* need not to demand it or tender the assurance, for *A.* at his peril must do it, otherwise he doth break his covenant. * And yet if in this case *B.* do get the assurance drawn, and tender it to *A.* it seems *A.* is bound to seal it, or * otherwise he doth break his covenant. † And if the case be so that *A.* is bound to make such assurance to *B.* by a day, at the costs of *B.* in this case *A.* must do the first act, viz. notify to *B.* what manner of assurance he will make, that he may know what money to tender; and when the money is tendered, *A.* must see that he do make the assurance accordingly at his peril; and if he fail in either of these, the covenant is broken (*o*).

If *A.* be bound to make such assurance to *B.* as by the counsel learned of *B.* upon request made shall be devised; in this case it is sufficient if the advice be given to *B.* and that he do make it known to *A.* and it is not needful it be given to *A.* immediately. And if *A.* covenant with *B.* to make such assurance to *B.* as *I. S.* shall devise, and *I. S.* doth devise a reasonable deed of bargain and sale, and he tender it to *A.* to seal; in this case *A.* is bound to seal it presently, and he shall not have time to advise

Co. 5. 19. 20.
Dier 361. and
per Justice
Bridgeman.

* Trin. 20 Jac.
B. R. Steed &
Spike.

† Co. 5. 20. 22.

Co. 5. 20.

Dier 338.
Co. 2. 3.

(*m*) As to covenants to make such assurance as counsel shall advise; to make assurance generally; and for further assurance, see fully in Vin. Abr. Covenant (W.) (G. a.) 1 Wood. 417. Gilb. Covenant, 209. 226. Cro. Jac. 251. and see infra, page 177, note (*d*), on the subject of the usual claim of covenants for the title.

(*n*) But in the case of a contract for the purchase of an estate, the circumstance of the conveyance not being made by the day stipulated in the contract, does not, generally speaking, annul the contract in equity, unless the time, as it is termed, is of the essence of the contract. But for further information on this subject, see Mr. Sugden's Vendors and Purchasers, 5th ed. pages 328 and 346.

(*o*) Except where there is an express stipulation that the vendor shall prepare the conveyance, it seems to be now settled, that the purchaser must prepare it and tender it to the vendor for execution before he can bring an action or file a bill for non-performance of the contract. Sugd. Vend. and Purch. 5th edit. 216. And it would be the same, it is presumed, even where the vendor may have stipulated to be at the expence of the conveyance.

with

Experientia.

with his counsel upon the deed; but if he be illiterate and cannot read the deed, he may refuse and delay to seal it until he can get some body to read it, which he must do as soon as he can. And if one be bound by covenant to make an assurance upon request: the covenantee must request, and tender an assurance also, and he must tender such a one also as is reasonable, otherwise the covenant will not be broken by the refusal or neglect to do it: as if one be bound to make a feoffment to *A.* upon request; in this case *A.* must get a naked deed of feoffment drawn without warranty or covenants, and tender it. And if the covenant be to make such a lease as the former; in this case the second lease must not differ from the former, and if it do, the party is not bound to seal it.

Curia Hil.
7 Jac. Co. B.

If one covenant to levy a fine at the next assises for thirteen years *extunc*; this shall be taken from the time of the fine levied, and not from the time of the covenant (*p*).

Adjudged in
Sir Jo. Bret's
case.

If one bargain to sell land to me by deed indented, and before the enrolment of the deed I do covenant with *I. S.* to convey all the land whereof I am seised, and to do this before such a day, and before the day the deed is enrolled; in this case, my covenant shall not extend to this land conveyed to me by this bargain and sale.

Dier 371.

If *A.* covenant with *B.* that in consideration of a marriage between the son of *A.* and sister of *B.* that he, at the costs of his son, and by his sufficient deed, will before Easter-day assure land to his son, and *B.* doth covenant that if *A.* do perform this, then he will make him a general release; in this case, albeit *A.* be ready, if the son do not tender the assurance, and the conveyance is not made, *B.* is not bound to make any release (*q*).

If

(*p*) In this case the covenantee must do the *first act*, viz. sue out a writ of covenant, otherwise there will be no breach of the covenant: see *supra*, page 137, note (*o*).

(*q*) It may not be improper in this place to take some notice of *mutual covenants or agreements*, or covenants or agreements on the one side, depending upon the previous doing of something on the other. Thus, where a person upon the marriage of his daughter agreed to pay a portion with her, *provided the husband settled a jointure* within a certain time. The wife died without the jointure having been settled: After her death the husband brought a bill for the portion; but the court dismissed the bill; and on the ground *that he had not performed the condition*. *Coll. Cheeke's case*, cited 1 Vern. 69. (Reported in *Cas. temp. Finch*, 99, by the name of *Cheeke v. Lisle*.) And though the wife died long before the expiration of the period within which the jointure was to be settled, yet that circumstance was held not to make any difference. Indeed, when it is considered that the payment of the portion was to depend upon the *previous settling of the jointure*; (which, as the event had happened, could never be settled) it seems impossible to say that it could make any.

Where, however, the condition is complied with, or where the covenant on the one side has been actually performed, it can hardly be necessary to observe, that the covenant on the other must be performed also. *Rhodes v. Thornton*, *Cas. temp. Finch*, 150. *Otway v. Braithwaite*, *Cas. temp. Finch*, 405. And if the performance on the one side is even *after the time agreed upon*; a performance on the other will, generally speaking, be enforced. *Radcliffe v. Warrington*, 12 Ves. 333. *Seton v. Slade*, 7 Ves. 273.

But where there has been only a *part* compliance with the condition; *there the performance on the other side will not be enforced*; or at least not enforced *in toto*.—To afford a right to a *full* performance on the other side, there must be a *full* compliance with the condition. *Prec. in Cha.* 186. But it may be inferred, from what was said by the Master of the Rolls in the case of *Baskerville v. Gore*, (and see *Powell v. Pillett*, *Gilb. Eq. Cas.* 188.) that if the condition is *in part* performed, *that there* there must be a *proportionable* performance on the other side; and this seems to be nothing more than what is fair and reasonable. [Though query whether the party in such a case must not be left to his remedy at

To repair the house. If one covenant to keep and leave a house in the same, *Fitz. Cove-*
 or as good plight, as it was at the time of the making of said 4.
 the

at law; it being held, that courts of equity cannot execute an agreement in part; as that, in effect, would amount to an assessing of damages; which courts of equity have no power to do. See *Max. in Eq.* page 6, in note, and 3 *Atk.* 189.]

It would appear, however, that if there has been a part performance on the one side, and a performance of the residue is rendered impossible by the act of God; that in some cases so circumstanced there must be an entire performance on the other side. As if the condition is to make a jointure upon the wife, and also a settlement upon the issue. Here, although the wife should die before the jointure is settled, yet if she leaves issue, and the settlement is made upon them, the covenant on the other side must be performed. See *Lord Feversham v. Watson*, *Cas. Temp. Finch*, 445. And see *Winn v. Meredith*, *Pres. in Cha.* 312.

But although the condition is in part performed, and although the performance of the remainder becomes impossible by the act of God, yet if the party, who has in part performed the condition, remains in *statu quo*, a performance on the other side will not be enforced. Thus, where the intended husband covenanted (amongst other things) to settle the manor of *Holdenby* upon the wife and issue of the marriage, and the wife's father covenanted, that after the husband had settled £810 a-year on the wife, that he (the father) would make certain settlements mentioned in the articles. The marriage took effect, and the wife died without issue. The husband settled the manor of *Holdenby*, but did not perform any other part of the agreement, and after his wife's death he brought a bill in equity against the heir at law of her father, for a specific performance of the father's part of the agreement. The court however dismissed the bill; and on the ground, as would appear, that the husband was in *statu quo*; for although he had settled the manor of *Holdenby*, yet as his wife died before him, and without issue, he was in the very same situation, even with respect to it, as if the settlement had never been made. See the *Earl of Feversham v. Watson*, *ubi sup.* [If being in *statu quo*, is alone a ground to refuse to execute articles at the instance of a person who has in part performed the condition, there appears to be reason to think, that the court would equally refuse its aid, even where the condition is wholly performed, provided the party performing it is still in *statu quo*. It may be proper, however, to observe, that there is a case in *Finch's Reports*, (*Bacon v. Clarke*, 244) in which the Court of Chancery decreed a specific performance, where the plaintiff had performed the condition in toto, notwithstanding he was in *statu quo*.]

Although it is evident, that equity will not enforce the execution of an agreement, when something, still unperformed, was to have been previously done by the party seeking its aid; (except where there has been a part performance of the agreement which does not leave him in *statu quo*, and the performance of the rest is prevented by the act of God,) yet if the performance of the agreement did not depend upon the party claiming the assistance of the court, but upon another person; then, notwithstanding the non-compliance with the condition, equity will enforce a performance of the agreement. It is apprehended, however, that the party claiming the assistance of the court, must not derive his claim, either by descent or otherwise, from the person who was to have performed the condition. If he does, he will be entitled to no more consideration, it is presumed, than that person himself would have been. Thus where, upon the marriage of Sir Francis *Hollis* with *Lucy Carr*, Sir Robert Carr, her father, agreed that Sir Francis should have £6000 with her; and Lord *Hollis* (Sir Francis's father) agreed to settle a jointure upon the lady. The marriage took place, and the wife died without issue before the portion was paid or the jointure settled. Sir Francis *Hollis* brought a bill for his wife's fortune against her father, who contended it ought not to be paid, because it was to be in consideration of the jointure agreed to be settled by the plaintiff's father, but which was never done, and could not then be done. But the court decreed in favour of the plaintiff, observing that his father not having settled the jointure, was not his, the plaintiff's fault. *Hollis v. Carr*, *Ca. Temp. Finch*, 261. And see *Perkins v. Thornton*, cited 1 *Ves.* 377.

And upon the same principle, if the agreement is to make a settlement on the husband for life, with remainder to the issue of the marriage, upon condition of the husband settling a jointure, &c. Here, though the non-compliance with the condition might be a good reason for not performing the agreement in favour of the husband; yet, it is presumed, it would be none for not performing them in favour of the issue. Lord *Hardwicke* appears to have expressed himself to this effect in the case of *Harvey v. Ashley*, (3 *Atk.* 611, and see *Lord Feversham v. Watson*, *Cas. Temp. Finch*, 449;) where he said, that the non-performance on one part was no impediment to the children recovering the full benefit of the settlement. And in the case of *Crofton v. Ormsby*, (2 *Scho. & Lef. Rep.* 602.) Lord *Redesdale* seems to have been of the same opinion.

If, however, the person against whom a performance of the covenant or agreement is sought was to have derived a benefit from the performance of the condition, but which, owing to the non-performance of the condition, he has not derived; there, it would appear, a performance on the other side will not be enforced, even at the instance of the children.

Thus, where marriage articles were entered into, by which it was agreed, that the husband's estate should be settled upon the wife for her jointure; then, as to part, for securing younger children's portions; then, as to the whole, in strict settlement. It was agreed, that the wife's fortune should remain with

the lease; in this case the ordinary and natural decay of it is no breach of * the covenant; but the covenantor is hereby bound to do his best to keep it in the same plight, and therefore to keep it covered, &c. (r).

* P. 169.

Dier 19.

If the words of a covenant be [that the lessee shall have thorns by the assignment of the lessor, and necessary fuel also;] it seems by this, that there must be an assignment of the fuel as well as of the thorns.

For the having of houseboot, &c.

Dier 19, 20.

If the lessor covenant with his lessee, that he shall have sufficient hedgeboot by assignment of the bailiff of the lessor; in this case and by this, the lessee is not restrained from that liberty that the law doth give him, and therefore that he may take without assignment: but if the words be negative, that he shall not take without assignment, or that he shall take by assignment, and not otherwise, *contra* (s).

Tvin. 21 Jac.
B. R. George
versus Lanc.

If A. doth covenant with B. that whereas a marriage is intended to be solemnized between A. and C. the daughter of B. at or before the fourteenth day of August next, and whereas the said B. hath paid to the said A. a thousand pounds for portion, &c. the said A. in consideration thereof, doth covenant with B. that he, within one year of the

To convey lands of the value of, &c.

with trustees until the settlement was made, and then to be applied in discharging incumbrances upon the husband's estate, and the surplus for the husband absolutely. The marriage took effect; the husband died leaving issue by his wife, but without making any settlement; indeed, it appeared that he had no estate to settle. The husband having made no settlement, the wife, after his death, filed a bill against the trustees, for the repayment of her fortune. As it had been agreed, that it should be laid out in discharging incumbrances upon the husband's estate, which was to have been settled for the benefit of the children, the children insisted upon being purchasers of an interest in it, notwithstanding no settlement had been made by their father. Lord Hardwicke, however, held that they were not entitled to any part of it: and his Lordship observed, that no court of justice could take the fortune from the mother, *unless she had the settlement agreed for her benefit*. See *Pyke v. Pyke*, 1 Ves. 376. The soundness, however, of this decision is perhaps doubtful, and its authority is the more open to doubt in consequence of what was said by Lord Redesdale in the above noticed case of *Crofton v. Grimsby*: His Lordship observes, "if a woman upon her marriage, contracts for the settlement of her estate in a certain way, by which the husband is to gain a benefit; and he contracts to make a settlement, and she appears not to have the estate she contracted to settle, the object of that contract being to give a larger settlement to her; that might be a case in which the wife should not be allowed to have the benefit of the husband's contract; but that would not affect the children, they must have the estate." "This has been over and over again decided on marriage contract cases."

It may here be observed, that in all these cases, where the performance of the agreement on one side, is made to depend upon the compliance with a condition on the other, that no action for damages will lie at law, until the condition has been complied with.

But where the performance on one side is *not* made to depend upon something to be previously done on the other, but the stipulations on one side are *independent* * of those on the other; there the non-performance on one side is no bar to an action for damages. The non-performance, however, would, it is apprehended, be a bar to a bill in equity: for on what principle of equity could the party bringing the bill require the aid of the court, if he had not performed his part of the agreement; or at least, by his bill, did not offer to perform it?—The maxim of equity is, that he who seeks equity, must do equity. Indeed, although covenants or agreements, where there are stipulations on both sides, may in form or in words be independent of each other, yet it must be evident that in substance they are *not* so; for no one can doubt but that the covenant on one side was the motive or inducement to that on the other; and therefore equity, which regards the substance and not the mere form of the thing, will, it is conceived, regard such covenants exactly in the same light as if they were actually conditional or dependent in words.

(r) See accordingly, in Gilb. Covenants, 149; and see more amply how covenants to repair shall be expounded, Finch Rep. 86. *Lant v. Norris*, 1 Burr. 287. 1 Wils. Rep. pt. 1. p. 75.

(s) See accordingly *Sherwood v. Noonan's case*, 1 Leon. 250.

* In a note of the late Mr. Serjeant Williams, to Saunders's Reports, the reader will find the distinctions between the dependency and independency of covenants and agreements, taken with that accuracy and ability, for which the learned Editor was so eminently distinguished. See *Finch v. Irwin*, 14. Raym. 134.

day of the marriage, will assure lands of the value of four hundred pounds *per annum*; in this case albeit the marriage be not on or before that day, yet the covenant must be performed (t).

That the lessee shall make estates.

If one make a lease for years of a manor, and covenant that the lessee shall make estates for life or years, and that they shall be good; in this case, it seems this covenant shall not be taken to enable the lessee to make estates for a longer time than his estate will bear.

Per Justice Bridgman.

That if the lessee sell, the lessor shall have the first refusal.

If the lessee covenant with the lessor, that if the lessee be minded to sell his estate, the lessor shall have the first refusal (u); in this case when the lessee is minded to sell, he need do no more but acquaint the lessor with his purpose, and know his mind, and if he do not answer him presently, he may sell it to whom he will: and if the covenant be further, that the lessor shall give as much as another will, the lessee must tell him what another doth offer him, and ask him whether he will give so much, and if he refuse, or do not accept it presently, the lessee may sell to whom he will.

Dier 13.

To do one thing for another.

If one covenant to serve me a-year, and I covenant to pay him ten pounds for it; in this case albeit he do not serve me, yet I must pay him the ten pounds. But if I covenant with him to pay him ten pounds if he serve me a year, *contra*, for in this case I am not bound to pay him the money unless he serve me a-year. So if one covenant to make new pales so as he may have the old, in this case it seems he is not bound to make the new pales unless he may have the old pales. So if one covenant to pay money for service, counsel, or the like, or covenant to marry one's daughter, or make an estate, and the covenant is penned conditionally, and * so as one thing is the cause of another, and it is not set down by mutual and reciprocal covenants (w); in all these cases, if the cause, or condition, be not observed, the covenant shall not be performed.

Co. super Lit.
204. Dier 371.
Mich. 7 Jac.
Co. B.

* P. 170.

That the lessee shall have the fee.

If one make a lease for ten years, and covenant that if the lessee pay him ten pounds within the ten years that he shall have the fee simple, and the lessee surrender his estate within the time; in this case, if the lessee pay the money, the lessor is bound to make the fee simple to him (x). But if the words of the covenant be, that if he pay him ten pounds within the term, he shall have the fee, and the lessee surrender his term, and then pay the ten pounds; in this case the lessor is not bound to make the fee simple, for it was not paid within the term.

Co. 1. 144.

Assignees.

If one covenant to do a thing to I. S. or his assigns, or to I. S. and his assigns by a day, and before the day I. S.

27 H. 8. 1.

(t) See Treatise on Marriage Settlements, page 449, on the subject of covenants or agreements to settle lands of a certain annual value.

(u) See *supra*, page 161, note (e).

(w) See page 168, note (q), on the subject of dependant or mutual covenants.

(x) It is only in equity that he is bound to do so; for at law, if there was a breach of the covenant, the covenantee could only recover damages: And if the covenantor should have sold the estate to a purchaser for a valuable consideration without notice of the covenant before any bill was filed for a specific performance, in that case the covenantee could have no remedy in equity; and his only remedy could be by an action for damages.

die;

die; in this case it must be done to his assigns if he before the day name any assignee, and if he do not, it must be done to his executor or administrator which is an assignee in law (y). See more in *Condition, numb. 8. Obligation, 7.*

Dier 303.
Co. 9. 60.

Adjudged Sir
Perrill Broca's
case. 32. Q.

Mich. 8 Jac.
Lam's case.
Dier 328.
F. N. B. 145.
26 H. 8. 3.
Hil. 39 Eliz.
B. R. Corne's
case. Fitz.
Covenant 26.
Bro. Covenant
40.

10 Jac. Bro.
Covenant 7.

If one be seised of land in fee, or possessed of a term of years, and he doth alien it, and supposing he hath a good estate, he doth covenant that he is lawfully seised or possessed, or that he hath a good estate, or that he is able to make such an alienation, &c. and in truth he hath not, but some other hath an estate in it before; in this case the covenant is broken as soon as it is made (z). And if I bargain and sell land, by deed indented, to *B.* and before the deed is inrolled, I grant the same land to *C.* and covenant that I am seised of a good estate of it in fee, and after the deed is inrolled; in this case the covenant is broken (a).

If *A.* let land to *B.* and covenant that he shall quietly enjoy it without the let of any person whatsoever, and *A.* himself, or any other person that hath any title to the land by or under him, as if he make a lease of it, or grant a rent out of it to another, or any other person that hath any title to the land, albeit it be not by or under *A.* as if *A.* were a disseisor, and the disseisee do enter or disturb *B.* in all these cases the covenant is broken (b). And so also is the law deemed to be by some in case of covenant in deed for quiet enjoying, where a stranger or one that hath no title to the land doth enter or disturb *B.* (c). But otherwise it is in case of covenant in law for quiet enjoying; for in this case if a stranger that hath no title to the land doth enter or disturb the lessee, this is no breach of the covenant in law. And in all cases where any person hath title, the covenant is not broken until some entry or other actual disturbance be made by him upon his title.

If a man make a lease of land, and after make a feoffment of the same land, and the feoffee doth disturb the lessee; in this case it hath been said this is a breach of the covenant for quiet enjoying. *Sed quere.*

7. When a covenant in deed or law shall be said to be broken: and when not: and how.

That the covenantor is seised of a good estate, &c.

For quiet enjoying.

* P. 171.

(y) If the covenant, in the case put in the text, was to convey an estate in fee simple, the word *heirs*, it is presumed, would be considered to have been omitted by mistake, and the heir would be the person entitled to call for the conveyance. See *supra*, page 85, note (d), on the subject of supplying mistakes and omissions, by construction.

(z) And if two men upon sale of their wives lands covenant that they and their wives have good right to convey; if one of the women is under age, it is a breach; for she has not the power to convey according to the covenant. *Nash v. Ashton*, Sir T. Jones, 195. But no cause of action arises in such a case as the above, till the purchaser is disturbed in the enjoyment of the land; or in other words, till he is so disturbed he would obtain no damages in an action brought upon the covenant.

(a) See more fully as to the covenant that grantor is seised in fee, &c. *infra*, page 177, note (d), and *Vin. Abr. Covenant* (Y.) Parols (D.) pl. 4. Cro. Jac. 369. 3 Lev. 46.

(b) Lessor covenanted that lessee, paying the rent and performing the covenants, should quietly enjoy. The breach assigned was a disturbance by the lessor, who pleaded that till such a time the plaintiff did quietly enjoy, but then he cut down wood, which was contrary to his covenant, and then, and not before, defendant entered; and so by plaintiff's not performing his covenant the defendant's covenant ceased to oblige him; whereunto plaintiff demurred.—The question was, whether the defendant's covenant was conditional or not? And judgment was given for the plaintiff that the covenant was not conditional: *Hays v. Bickerstaffe*, 2 Mod. 35. On the subject of conditional or dependant covenants, see *supra*, page 168, note (q).

(c) See *supra*, page 166, note (i), on the subject of tortious eviction, or eviction by a stranger.

If

If a man purchase land to him and his wife and his heirs in fee, and then make a lease for years of it to *I. S.* and covenant for him, his executors and assigns, that the lessee, his executors and assigns, shall quietly hold and enjoy the premises without the let of the lessor, his heirs or assigns, or any other person by or through his or their means, title or procurement, and after the lessor doth die, and his wife doth enter and disturb; in this case and by this means the covenant is broken (*d*). And so it is also, if *A.* purchase land of *B.* to have and to hold to *A.* for life, the remainder to *C.* the son of *A.* in tail, and after *A.* doth make a lease of this land to *D.* for years, and doth covenant for the quiet enjoying as in the last case, and then he dieth, and then *C.* doth oust the lessee; in this case this was held to be no breach of the covenant (*e*). So likewise if *A.* be seised of white acre in fee, and take to wife *B.* and then make a lease of it to *C.* with such a covenant as before for the quiet enjoying, and then *A.* doth die, and after *B.* doth recover dower; by this the covenant is broken, and yet if the mother of *A.* recover dower and oust the lessee, *contra*. So also if a tenant in tail doth make a lease with such a covenant, and his issue doth disturb the lessee; this is no breach of the covenant. And yet if the lessor be the cause of the gift in tail, or procure the disturbance, this may be a breach of the covenant. And so also it is where a man is seised of land in fee, and he doth make a lease with such a covenant, and afterwards he doth die, and then his heir is in ward by reason of a tenure, and hereby the lessee is disturbed; it seems this is no breach of the covenant.

If one covenant that the wife he is about to marry shall quietly enjoy all her goods, and that the covenantee shall take it into his possession, and the husband doth only take the goods and keep them in his possession; this is no breach of the covenant.

If a covenant be for the quiet enjoying against all persons but the king and his successors; and the patentee of the king do disturb; this is a breach of this covenant.

If two make a lease, and covenant that the lessee shall enjoy the land without the let of them or any other, and one of them alone doth disturb the lessee; this is a breach of the covenant.

If a lessee grant and assign all the land contained in his lease to *A.* and doth covenant with him that he hath not done any act or thing by which the grant or assignment might be impaired, but that the assignee his executors, &c.

Hil. 20 Jac.
adjudged B.R.
Butler versus
Lady Swinerton.

Swan's case,
M. 7 & 8 Eliz.

Dier 42.
26 H. 8. 3.
Fitz. Covenant
6. 26.

Curia. B. R.
Pasc. 6 Car.
Crowle's case.

Adjudged Hil.
38 Eliz. Wood-
roffe versus
Greenwood.
Adjudged
Mich. 2 Car.
B. R. Sander's
case.

Dier 240.

(*d*) For she claims by the means of the baron, and she is therefore within the covenant: Cro. Jac. 637. Palm. 339. S. C.

(*e*) There appears to be an inconsistency in the last stated case. The case put immediately before, is a case in which the covenant is said to be broken. The case last put begins by saying, "and so it is also, &c." which must mean, "and so the covenant is also broken if, &c." yet after stating the circumstances of the case, it concludes by saying, "this was held to be no breach of the covenant." It is conceived, however, that the covenant is broken; for there is the same reason for holding that the covenant is broken in this case as in the former. The breach indeed is conceived to fall fully both within the letter and spirit of the covenant; for the disturbance by *C.* is clearly a disturbance by a person who claims by means, or by the procurement, of the covenantor.

may enjoy it against all persons, and before this time the wife of the lessor had recovered and had execution of a third part of this land for her dower; in this case this * is no breach of the covenant, for the words [but that, &c.] do refer to the former, and are not absolute (f).

* P. 172.

Adjudged
Rich versus
Row, Pasch.
13 Jac. Co. B.

If A. grant the bailiwick of W. to B. for life, and B. assign it to C. for three years, and after to D. and C. doth covenant with D. that he will not do, or suffer to be done, any act during the said three years by which the grant made by A. may be forfeit, but that after the three years ended he may enjoy it in as ample manner as C. did, or might have done, without any act by C. and after the three years ended, C. doth execute a process there, and thereby incroach upon the office; this is no breach of the covenant.

Curia Hil.
20 Jac. Co. B.
Greenway &
Tackfald's
case.

If A. grant land to B. and his heirs rendering ten pounds rent, and B. doth sell the land to C. and his heirs, and doth covenant with C. that from such a day he shall enjoy it discharged of all incumbrances, and before that day a common recovery is had against C. in which A. is vouched, and this is to the use of C. and his heirs, supposing hereby the rent had been gone which is not so; in this case the covenant is broken, for this rent is an incumbrance.

To free from
charges and
incumbrances.

Co. 10. 32.

If a lease be made of land for years, and the lessee devise it to his wife *durante viduitate*, and after to his son, and he in reversion doth sell the fee to the woman during the widowhood, and doth covenant that the land is discharged of all former sales, rights, titles, charges: in this case the covenant is broken at the first by reason of the possibility of the son.

9 Eliz. Co. B.

If A. grant white acre to B. and covenant that B. shall enjoy it against all incumbrances, and C. doth disturb him in the taking of common there, and this is a common which is against common right, and which he hath by prescription: in this case it seems this is a breach of the covenant. But if it be of a common that is of common right, *contra* (g).

Dier 139.

If A. covenant with B. before Easter to make him a good sure estate of land, discharged of all former bargains, leases and incumbrances whatsoever (leases or grants for life, or years, reserving the ancient rent, during the term, only excepted), and A. after this, and before the estate made, doth make a grant of all or part of the land reserving the old rent, it seems this is no breach of the covenant.

To make es-
tates and as-
surances.

Co. b. 21.

If one make a lease to I. S. for years, and covenant with him that upon the surrender of that lease he will make him a new lease, and the lessor, before I. S. can make any

(f) The former covenant is restrained or confined to the acts of the covenantor; and, generally speaking, where the first of a chain of covenants contains *restrictive words*, and all the covenants have one and the same common object, the restrictive words in the first of the chain of covenants will be considered as extending to them all: see *Browning v. Wright*, 2 Bos. & Pull. 13. *Howell v. Richards*, 11 East. 1. R. 633. *Norris v. Munn*, 3 Lev. 46, and see 8 East. T. R. 89, and 3 Bos. & Pull. 574: and see more fully *infra*, page 177, note (d), on the subject of limited or restrained covenants.

(g) See further as to covenants free from incumbrances, *Vin. Abr. Covenant* (A. a.) 1 Wood, 415. *Gibb. Covenant*, ch. 31.

surrender,

surrender, doth sell away the reversion, or make a lease to another of the land, and so disable himself, this is *ipso facto* a breach of the covenant, without any surrender made by the lessee, which in this case is not needful. For *Lex neminem cogit ad vana & in utilia peragenda*. So if one be seised of land in fee, and covenant to make a feoffment of it to *I. S.* by *a day upon request, and the covenantor before the day doth make a feoffment of it to another, and then doth die before any request made to him; in this case the covenant is broken.

* P. 173.

If *A.* covenant with *B.* to make such assurance as *B.* or as the counsel learned of *B.* shall devise, and *B.* tender such an assurance to *A.* to seal, and *A.* doth refuse or delay to seal it; this is a breach of the covenant. Dier 338.
Co. 2. 3.

If *A.* doth covenant with *B.* *C.* *D.* and *E.* to make them a feoffment such a day, and they come to the land at the time to take it, and *A.* doth not make the feoffment; by this the covenant is broken. And so also if *B.* and *C.* only, or one of them, doth come to the land; for it may be made to any of them in the name of the rest. But if none of them come to the land, albeit the feoffor never come, there it seems the covenant is not broken. Bro. Covenant
3.

If *A.* covenant with *B.* before Easter next, to assure his house to him and *K.* his wife, during the life of *I. S.* and *A.* surrender his house to the use of *B.* and such person as *K.* shall name, at the request of *B.* in this case the covenant is broken, for this is no performance of it. Caria B. R.

To repair.

If one covenant to repair, sustain and amend a house, and the house is burnt by the negligence of the covenantor and not repaired again; this is a breach of this covenant (*h*). And if the lessee covenant for him and his executors to repair at his own costs (the principal timber, not hurt, nor in decay for lack of reparations or otherwise in default of the lessee or his executors only except), and he die, and afterwards the house is burnt in default of the executors; in this case the covenant is broken, and the executors may be charged (*i*). Dier 324.
Fitz. Covenant
29. Co. 5. 15.
F. N. B. 145.
Co. 1. 98.
Perk. sect.
738. Dier 33.
Plow. 29.
40 E. 3. 5.

If one covenant to leave a wood in the same plight he finds it, and he cut down trees; in this case the covenant is broken presently, for it is now become impossible to be performed by his own act: but if in this case some of the trees be blown down with the wind, or the like, by this the covenant is not broken, for it is now become impossible to be done by the act of God, and in this case the covenantor is not bound to supply it (*h*). And so likewise

(A) Where a lessee of a house covenants to repair generally, without any exception of destruction or damage by fire, he is bound to rebuild in case the house is burnt down, as the act of the 6 Ann. c. 31, does not apply to such a case. *Balfour v. Wilton*, 1 Durnf. & East's, T. R. 510. *Chesterfield v. Bolton*, Com. Rep. 627. *Bullock v. Domett*, 6 T. R. 650. *Compton v. Allen*, Sty. 162. *Monk v. Cooper*, 3 Anst. 687. *Holzapffel v. Baker*, 18 Ves. 115. If however, notwithstanding such a covenant on the part of the lessee, there should be a covenant on the part of the lessor to insure to a certain amount, and to lay out the money in re-building, this latter covenant would, it is presumed, be a ground, in equity, of relieving the lessee from his covenant to the extent of the sum covenanted to be insured by the lessor.—In the covenant to repair by the lessee, it is usual to insert an exception in the case of damage by fire or other inevitable accident.

(i) *De bonis testatoris tantum*. See Dyer, 324 b, page 157, notes (q) and (s).

(k) See supra, page 133, note (b), and as to conditions becoming impossible by the act of God.

of

of a covenant to repair houses, or if one covenant to sustain houses, or sea banks, or covenant to leave them in as good case as one doth find them, and the houses be burnt, or thrown down by tempest, or the like, or the banks be overthrown by a sudden flood, or the like accident; in this case the covenant is not broken by this accident only; but if the covenantor doth not repair and make up these things again in time convenient, the covenant will be broken (l). And if houses be let to me for years, and I covenant to leave them in as good plight as I find them, and I throw down the houses, this is no breach of the covenant, for I may re-edify them, * and therefore no action will lie upon this covenant until the end of the term.

* P. 174.

Hil. 8 Jac.
Curia.

If one covenant to repair a house before a day, and it happen the plague is in the house before and until the day; and thereby it is not done; in this case the covenant is not broken, for this will excuse; but then it must be done in convenient time afterwards, for otherwise the covenant will be broken.

Dier 193.

If a lessee covenant to do all the reparations of a house demised, at his own costs and charges, and he cut trees upon some of the ground demised to amend the house; it seems this is a breach of his covenant (m).

Co. super Lit.
292.

If one covenant to pay money at five several days, and he fail of payment the first day; by this the covenant is broken (n). To pay money.

40 E. 3. 5.

If one take land sowed, or a stock of cattle in lease for years, and the lessee covenant to leave it in as good plight as he doth take it; in this case he must leave it sowed again, and if any of the cattle die, he must make up the number, otherwise he doth break his covenant. To leave a stock, &c.

43 E. 3. 17.

If a corporation do covenant not to take toll, and their common officer appointed for that purpose doth take it; toll this is a breach of the covenant. Not to take

(l) Although, generally speaking, where damage is done by the act of God, as in the cases put above, the law does not, of its own operation, hold the lessee liable either in an action of waste or otherwise, yet if he expressly stipulates to keep sea banks, &c. in repair, and any inevitable injury should be done to them, there he is liable to make good the injury; for where a party by his own contract imposes a duty upon himself he will be bound to perform it. See *Brecknock Navigation Company v. Pritchard*, 6 T.R. 750. *Paradise v. Jane*, Dyer, 33. Allen, 37.

(m) See last page note (h), on the subject of covenants to repair houses.

(n) An action of covenant lies upon the first default, but an action of debt will not lie till the last. See 3 Co. 22 a. and see *Rudder v. Price*, 1 Hen. Bl. 547. In Co. Lit. 292 b. a distinction is taken between a debt due by contract or bond, [though query in the case of the bond, and see subsequent part of the note] and a debt due by recognizance; for if a recognizance be to pay money at five several days, after the first day of payment and default, execution may be taken on the recognizance for the whole sum, it being in the nature of several judgments. And in the case of a bond with a penalty for payment of several sums at different times, an action of debt for the penalty of the bond will lie immediately upon any of the sums not being paid, and that although the condition of the bond does not in express terms provide that the bond should be in force in default of payment of any of the sums. *Coates v. Hewitt*, 1 Wils. 80. and *Hallett v. Hodges*, ibid. and see 1 Selw. 513. and Say. Rep. 29. But the obligee would be restrained from taking out execution from time to time for more than the sum actually due. In the case of a mere covenant or promise to pay money by instalments, and also in the case of an award directing money to be paid by instalments, if an action is brought upon one instalment becoming due, no more can be recovered by such action than the instalment which is due; and in order to recover any future instalment, a fresh action must be brought. *Cooke v. Whorwood*, 2 Saund. Rep. 337. *Milles v. Milles*, Cro. Car. 241.

To build a house.

If *A.* covenant with *B.* to build a house by a day, and *B.* doth forbid him, and thereupon he doth forbear to do it, and doth it not; in this case the covenant is broken, for this will not excuse him: But if he do by any actual impediment hinder him, or be the cause why the thing is not done, then the not doing of it is no breach of the covenant. And therefore if a lessee covenant to cleanse one of the ditches in the land demised, and the lessor enter upon the land itself, and keep out the lessee, and he doth not cleanse the ditch by the time; by this the covenant is broken: But if in this case the lessor do by force keep the lessee out of the ditch or place itself, *contra*.

18 E. 4. 8.
Kelw. 34.
Trin. 36 Eliz.
B. R. Carrell
v. Reade.

To cleanse a ditch.

If *A.* and *B.* be joint-tenants of a shop, and *A.* covenant with *B.* that he and his assigns shall have free ingress and egress in and out of the shop, and *A.* doth appoint *C.* his servant to enter as servant to him and to occupy in common with *A.* and this servant doth expel the servant of *B.*; in this case, this is a breach of the covenant.

Hil. 16 Jac.
B. R. Siliard v.
Loc.

To have liberty to go in and out of a shop.

To come into a house.

If *A.* covenant with *B.* that *B.* shall come four times a year into the house of *A.* without being ousted by *A.* and *A.* when he doth see *B.* coming, doth shut the doors and windows, and doth not suffer *B.* to come in; by this the covenant is not broken (o).

3 H. 4. 2.

To marry another.
Make a feoffment, &c.
Tender and refusal.

If *A.* covenant with *B.* to marry the daughter of *B.* make a feoffment, or do any other act to *C.* (who is a stranger to the covenant), and *A.* doth tender it and offer to do as much as doth lie *in his power, but the stranger doth refuse it, and thereby it is not done; yet this doth not excuse, but the covenant is broken. But if the covenant be to do any such act to the covenantee himself, and the covenantor tender it and the covenantee refuse it; by this the covenant is performed (p).

33 H. 6. 16.
Bro. Covenant
3. Fitz. Barre
62.

* P. 175.

See more in the last question, and in *Obligation, Numb.* 7, 8, 9, and in *Condition, Numb.* 9, 10.

Mich. 7 Jac.
Co. B.

8. Who shall or may have advantage of a condition in deed or law, and bring a writ of covenant upon the breach of it: or not.

Any one that is party to the deed to whom the covenant is made, may take advantage of the covenant, but not a stranger; for if *A.* covenant with *B.* to do an act to *C.* who is no party to the deed, and he doth it not, *B.* and not *C.* must sue him upon this breach (q).

If a lease be made of land to a husband and wife for years, and the lessor doth enter upon the land and put them both out, or the one of them after the death of the other, in this case both of them whilst they both live, and the survivor, after the death of one of them, may have this action of covenant upon the covenant in law. So if a wardship be granted to a woman by deed, and she take a husband and die; the husband shall have advantage of this covenant in law made by the word [grant] if he be dis-

Co. 5. 17.
Dier 237.
47 E. 3. 12.

(o) Query, in case a *specific day* is appointed for coming into the house, and the covenantee is forcibly presented from doing so, would not this be a breach of the covenant?

(p) The same reason it is presumed exists for the above distinction, as in the case of a conveyance upon *condition* to do an act to a stranger, who upon tender refuses; and to do an act to the person creating the condition, and who upon tender refuses. See Co. Litt. 209. (a).

(q) If *B.* should refuse to sue, a court of equity, it is apprehended, upon his being properly indemnified, would compel him to allow *C.* to make use of his name. Or if he should release without the consent of *C.*, equity, it is presumed, would set aside the release. Com. Dig. Chancery (2 X):

turbed.

turbed. So if one by the words [demise or grant] lease land to a woman sole for years, who taketh a husband and dieth; in this case if the husband be disturbed, he shall take advantage of this covenant in law.

Dier 338.

If a feoffment be made in fee, and the feoffor doth covenant to warrant the land, or otherwise, to the feoffee and his heirs; in this case the heir of the feoffee shall take advantage of this (r). As if A. covenant with B. and his heirs, to infeoff B. and his heirs, of land, and B. die before it be done, in this case his heirs shall take advantage thereof (s). And if A. B. and C. have lands in coparcenary, and they purchase other lands in fee, and they covenant each to other his heirs and assigns, to make such covenant to the heir of him that shall die first, of a third part, as he shall devise, in this case the heir, not the executor, shall take advantage of the covenant.

Heir.

Co. 5. 17.
F. N. B. 145.
H. Dier 112.
27 L.

Executors and administrators shall take advantage of inherent covenants, albeit they be not named (t). And therefore if A. covenant to do a thing to B. and do not name his executors or administrators, and it be not done, it seems the executors or administrators of B. may have an action of covenant for the not doing of it. As if one covenant with I. S. to pay him money at Michaelmas, and do not say to his executors, &c. and he die before the time; in this case his executor or administrator shall take advantage of this covenant and may recover the money.

Executors and administrators.

See Condition
Numb. 12.
Co. 5. 18.
9 Jac. B. R.
Wilborne and
Bestwick's
case, accord.

Grantees of reversions shall have the like advantage against fermors (by action only) for any covenant or agreement contained * in their lease, as the lessors, their heirs or successors might. And so also shall lessees against grantees of reversions (recoveries in value excepted) by the statute of 32 H. 8. cap. 34. And herein (as in the case of a condition before) a difference is taken between covenants that are inherent, and covenants that are collateral. For the covenants whereof grantees by this statute shall take advantage are inherent covenants, i. e. such covenants as do concern the thing granted and tend to the supportation of it: as where a lessee for life or years doth covenant with his heirs to keep the houses demised in good reparations, or the like, and after the lessor doth grant away the reversion of all, or part of the houses to I. S., in this case, I. S. shall take advantage for any breach of the covenant in his time, but not for any breach before the time the reversion was granted. But if the lessee doth cove-

Assignee or grantees.

* P. 176.

Mich. 8 Jac.
Pime's case.

(r) And where the covenant relates to the inheritance, and is such as runs with the land, though the covenant be with the lessor, his executors and administrators, without naming the heir, yet the heir shall have an action of covenant for breach. 2 Lev. 92, *Lougher v. Williams*. So where the covenant relates to the inheritance and runs with the land, if there has been a breach of it in the covenantee's life-time, the heir, (as the damage accrues to him,) has a preferable right to the executors to sue on the covenant. *King v. Jones*, 1 Marsh. 107. 4 Maul. & Selw. 188. and see *Kingdon v. Nottle*, 4 Maul. & Selw. 53. On the subject of covenants running with the land, see further, *infra*, page 177, note (d).

(s) The heir of B. would have a right, in equity, to call upon A. for a specific performance of his covenant; or he might sue upon it at law for damages.

(t) The executor, although he is not named, shall have an action of covenant in all such cases by the common law, because he is privy, and *quodam modo* a party, as he represents the person of the testator more than the heir. Co. Lit. 208, 209 a. See further in Gilb. Law of Covenants, 322.

nant with his lessor and his heirs to pay him a sum of money, or make him a feoffment, or the like, and then the lessor doth grant the reversion to *I. S.* in this case *I. S.* shall not take advantage of this covenant: and yet the executors or administrators of the lessor shall take advantage of this covenant (*u*).

Regularly every assignee of the land or thing demised shall take advantage of inherent covenants; as if a covenant be, to have estovers to burn in the house demised, or to have timber to repair, or if the covenant be that the lessor or lessee shall repair, or the like. And therefore of these assignees in deed, and in law, assignees of assignees *in infinitum* shall take advantage, and assignees of executors or administrators, tenants by statute, or elegit, or after a sale upon a *fieri facias*, a husband in the right of his wife; any one of these, and any other that shall come lawfully to a term unto which such a covenant is incident, albeit he be not named, yet may he take advantage of it (*x*).

If a lease for years be made to *I. S.* by the words [demise or grant] and the lessee assign this over to *I. D.*, in this case *I. D.* may take advantage of the covenant in law, and bring an action against the lessor if he be disturbed.

If a lease for years be made of land, and the lessor doth covenant with the lessee and his assigns to do, or not to do, something; in this case an assignee by word (*y*), or an assignee by deed, may take advantage of this covenant (*z*).

If two coparceners make partition of land, and the one of them doth covenant with the other to acquit her and her heirs of a suit that issued out of the land, and the covenantee doth alien her part to a stranger; in this case the alienee shall have the same advantage for acquittal of the land, as the covenantee had. So if *A.* be seised of the manor of *B.* whereof a chapel is parcel, and a prior with the consent of his convent had covenanted with *A.* and his heirs *lords of the manor, to celebrate divine service in the chapel, and after *A.* had sold the manor; in this case the vendee or assignee of the manor, should have had the same advantage of the covenant the vendor had. But if the lord had sold the chapel, the assignee of the chapel should not have taken advantage of the covenant. And if a covenant be to say divine service in the chapel of a stranger; in this case the assignee of the manor in which the chapel is, shall not take advantage of the covenant (*a*).

* P. 177.

(*u*) See *supra*, page 140, note (*y*), as to cases in which the grantee of a reversion may under the act of the 32 *Hen. 8. c. 3.* take advantage of the breach of a condition.

(*x*) See *Moor*, 242. *Godb.* 270. *Prec. in Chan.* 59.

(*y*) By the Statute of Frauds, 29 *Car. 2. c. 3.* a writing is necessary to the assignment of any interest in lands.

(*z*) See further in what cases an assignee shall take advantage of a covenant, *Cro. Eliz.* 373. *Cro. Car.* 137. *Bro. Abr. Covenant*, pl. 45. *Com. Dig. Covenant* (B. 3.) *Vin. Abr. Covenant* (K.) *Bac. Abr. Covenant* (E. 5.)

(*a*) See more fully who shall take advantage of a covenant and who not. *Com. Dig. Covenant* (H.) 1 *Wood.* 377. *Vin. Abr. Covenant* (H.) *Gilb. Law of Covenants*, 294. 319. 323. *Bac. Abr. Covenant* (E.)

Co. 5. 16. 17.
12.

Regularly all those that do seal and deliver the deed (b), and are named and bound by the express words of the covenant, whether the covenant be collateral or inherent, are bound by the covenant contained in the deed; and therefore if heirs, executors, administrators, or assigns be named in the covenant, for the most part they are bound by the covenant (c). And in all cases of inherent covenants also, where a man doth covenant for himself only, and doth not name his executors and administrators, or either of them: they are bound and may be charged by the covenant notwithstanding. And in some cases the law is so also for collateral covenants. And in most cases of inherent covenants that tend to the support of the thing granted (in respect of which it is presumed the lessor took the lessee for the land); such as have the land, albeit they be neither executors nor administrators or either of them, but assignees, &c. shall be charged by the covenant though they be not named, for these covenants are said to run with the land (d).

9. Who shall be bound and charge by a covenant: and against whom a writ of covenant doth lie: and where, or not.

Executors, administrators.

If

(b) A covenant, properly speaking, can only be created by deed, though it may either be by deed-poll or by indenture; (1 Roll. Abr. 517. Fitz. Nat. Brev. 145.) though in the case of a deed-poll the party must be named in it. *Green v. Horne*, 1 Salk. 197. But although the covenant must be contained in a deed, yet where lands are conveyed by indenture and the grantee accepts the deed and enters upon the lands, he will be bound by the covenants contained in it, although he does not execute it. 1 Inst. 231 a.

(c) Assignees, it is conceived, are not bound except in the case of covenants which run with the land; but it is apprehended a court of equity, where an assignee had notice of a covenant in which assignees were expressly named, would compel him to perform the covenant although it did not run with the land. But where a covenant runs with the lands, an assignee is entitled to the benefit of a covenant though it was entered into with the covenantor and his heirs only. See *Spencer's case*, 5 Rep. 16. *Bally v. Willis*, 3 Wils. 25. Co. Lit. 384 b.

(d) In order to a covenant's running with the land, it is not enough that it concerns, or relates to, the land, but it is necessary that there should be *privity of estate*, between the covenantor and covenantee. The case of *Roach v. Wadham*, 6 East Rep. 289, is an important one upon this point. In this case, an estate was conveyed to A. (a trustee to uses), to such uses as B. (a purchaser) should appoint, and in default of appointment to the use of himself in fee: and by the purchase-deed B. covenanted for himself, his heirs and assigns, to pay a perpetual fee-farm rent to the vendors their heirs and assigns. B. afterwards sold the estate, and by indentures of lease and release, A. (the trustee to uses), bargained, sold, and released, and B. (the purchaser under the former conveyance), bargained, sold, and released, and also directed, limited, and appointed* (blending the appointing and releasing parts together,) to C. and D. in fee, who covenanted with B. to pay the fee-farm rent and indemnify him from it. Upon a question whether C. and D. were liable to an action upon the covenant entered into by B. to pay the rent as his (B.'s) assignees, it was held that they were not; on the ground that there was no privity of estate between B. and C., by reason of the conveyance to C. and D. operating under the power of appointment, and not taking effect out of the estate or interest, which was vested in B. in default of appointment, consequently that C. and D. did not take the estate of B. to which his covenant was annexed, but that they took the estate of the person who sold to B. In the above case, the covenant entered into by B. was entered into by a purchaser, but in order to make covenants entered into by a vendor run with the land, privity of estate between the first and a subsequent purchaser is equally necessary as where the covenant is entered into by a purchaser. From

* Where a person has both a power and an interest, (as in the case above noticed) and the instrument by which he conveys the estate is both an exercise of the power and a conveyance of the interest, but in consequence of its being informally and unskilfully drawn it would have one effect as an exercise of the power, and another as a conveyance of the interest; generally speaking, in a case so circumstanced, the instrument shall be construed to operate either as an exercise of the power or as a conveyance of the interest as will best effect the intention of the parties. See *Cox v. Chamberlain*, 4 Ves. 651. The rule however does not appear to have been attended to in the above noticed case of *Roach v. Wadham*.

If a feoffment, or lease be made to two, or to a man and his wife, and there are divers covenants in the deed to be

Co. super Lib.
231. Dier 13.
Bro. Covenant
6. Det. 80.

the circumstance of it frequently happening that the legal estate is not conveyed by the vendor himself, but by virtue of a power of appointment, or by a mortgagee or trustee in whom it is vested, or from its not being conveyed to the purchaser himself, but to a trustee for him, cases must often occur where covenants do not run with the lands; consequently they must be deemed covenants *in gross*, and the benefit of them can only be obtained by or against an assignee of the lands, by using the name of the covenantee or his representatives; and even by this mode, if the covenantee or his representatives should not be the persons who sustain any damage by the breach of the covenant, it is presumed that damages could not be obtained by an action brought in their names. In order therefore to avoid the consequences which may arise from the want of privity of estate between vendor and purchaser, the vendor should always put himself into such a situation so that this privity of estate may subsist between him and the purchaser: and where covenants are entered into by the purchaser with the vendor, which are intended to be a burden upon the lands or upon the owner of them for the time being, there the vendor should require that the purchaser should take a conveyance of the legal estate to himself, and not to a trustee or to *asci* to bar dower; and in such a case the vendor should previously have the legal estate in himself, in order to convey it to the purchaser.

It may not be improper to take some notice in this place of the chain of covenants usually entered into by vendors with purchasers. These covenants usually are, 1st. that the vendor is seised in fee; 2dly. that he has power to convey; 3dly. for quiet enjoyment by the purchaser his heirs and assigns; 4thly; that the lands are free from incumbrances; and lastly, for further assurances.

Where a vendor has a power of appointment and subject to such power is seised in fee, there the first covenant ought to be, that the power was well created, and is subsisting; and the other covenants should be similar to those entered into by a grantor when seised in fee. As to the covenant for quiet enjoyment though it was formerly held, that it extended to all eviction whatever, (*Mountford v. Calaby*, Dyer, 328 a.) yet it seems to be now settled, that such a covenant shall not extend to a tortious eviction, but to evictions by title only; for if a purchaser is tortiously evicted or disturbed he has his remedy at law; and if he is legally evicted he has his action on the covenant. 2 Saund. 178 a. n. 8. 181 a. n. 10. *Dudley v. Folliot*, 3 T. R. 584. Et vide *Noble v. Smith*, 1 H. Bl. 34. Vaugh. 122. But where a person covenants for quiet enjoyment against a particular person by name, there the vendor is bound to defend the purchaser against the entry of that person, whether by title or not. *Foster v. Maper*, Cro. Eliz. 212. Hob. 35. *Haynes v. Bickerstaffe*, Vaugh. 118. A covenant that the party has a right to convey extends not only to the title of the covenantor, but also to his capacity to grant the estate. Therefore where, upon a conveyance by a man and his wife, the husband covenanted that they had good right to convey the lands, and the wife was under age, it was held, that the covenant was broken. *Nash v. Ashton*, Sir T. Jones, 195.

The above covenants are real covenants, and where there is privity of estate between the covenantor and covenantee they pass to all the assignees of the land, who may maintain actions upon them against the vendor and his heirs. *Middlemore v. Goodall*, 1 Rol. Abr. 521. *Spencer v. Boyes*, 4 Ves. 370. Covenants for the title are generally restrained to the acts of the vendor and his ancestors, and of all persons claiming under them: and although where there are several covenants of distinct natures, it has been held, that restrictive words annexed to one of the covenants shall not control the generality of the others, though they all relate to the same land; (3 Lev. 47. *Hughes v. Bennett*, Cro. Car. 495. S. C. T. Jo. 403. *Crayford v. Crayford*, Cro. Car. 106;) yet, where all the covenants have the same object, and restrictive words are inserted in the first of them, they will be construed as extending to all the covenants, although they are distinct. 3 Lev. 46. *Browning v. Wright*, 2 Bos. & P. 13. Et vide 3 Bos. & P. 574. *Peles v. Jerriss*, Dyer, 240. Cro. Jac. 615. pl. 5. *Broughton v. Conway*, Dyer, 240. Mo. 58. cited 8 East, 89. But where releasors covenanted that, "for and notwithstanding any act, &c. by them, or any or either of them done to the contrary," they had good title to convey certain lands in fee; and also that they or some or one of them, "for and notwithstanding any such matter or thing as aforesaid," had good right, &c. to grant; and likewise that the releasee should "peaceably and quietly enter, hold, and enjoy the premises granted, without the lawful let or disturbance of the releasors or their heirs or assigns, or of or by any other person or persons whatsoever;" and that the releasee should be kept harmless and indemnified by the releasors and their heirs against all other titles, charges, &c. "save and except the chief rent" issuing and payable out of the premises to the lord of the fee; the court held, that the generality of the covenant for quiet enjoyment against the releasors and their heirs, and any other person or persons whatsoever, was not restrained by the qualified covenants for good title and right to convey notwithstanding any act done by the releasors to the contrary. *Hocell v. Richards*, 11 East, 653. And where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appears or the covenants should be inconsistent. Thus where the covenant that the covenantor has a right to grant; and that the grantee should enjoy notwithstanding any claiming under grantor; these are two several covenants, and the first is general and not qualified by the second; the one covenant goes to the title, and the

be performed on the part of the feoffees, or lessees, and one of them doth not seal, or the wife doth, or doth not seal during

the other to the possession. *Norman v. Foster*. 1 Mod. 101. and see *Gainsford v. Griffith*, 1 Saund. 58. 1 Sid. 321. 2 Bos. & P. 23. 25. So where the assignor of certain shares in a patent right covenanted that he had good right to convey the shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had over the same; it was held, that the generality of the former words of the covenant was not restrained by the latter. *Hesse v. Stevenson*, 3 Bos. & P. 565. And as, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other, a preceding general covenant will not enlarge a subsequent limited covenant. *Trenchard v. Hoskins*, Winch. 91. 1 Sid. 328. 2 Bos. & P. 19. It should, however, be observed, that although general covenants will not be cut down unless the intention of the parties clearly appears, (*Cooke v. Foundes*, 1 Lev. 40. 1 Keb. 95. *Proctor v. Johnson*, Yelv. 175. Cro. Elis. 809. Gro. Jac. 238.) yet, if general covenants are entered into contrary to the intention of the parties, equity will afford relief. *Coldcott v. Hill*, 1 Ch. Ca. 15. 1 Sid. 328. *Fidler v. Studley*, Finch. 90. 2 Bos. & P. 26. 3 Bos. & P. 575. Where a vendor does not claim by purchase in the vulgar and confined acceptation of that word (2 Bl. Com. 241.) that is, by way of bargain and sale for money or some other valuable consideration, a purchaser is entitled to require covenants from such vendor extending to the acts of the last purchaser. For instance, if A. sell an estate which was devised to him, and the devisors father purchased the estate, the covenants for title are extended to the acts of the father. See 3 Pow. Conv. 206. 210. And a person claiming under a voluntary conveyance, is considered in the same light as a devisee.

So a person, whose estate is sold under an order of a court of equity, or by a trustee to whom he has conveyed it upon trust to sell, is bound to covenant for the title in the same manner as he must have done if he himself had sold the estate. But although the universal and settled practice of conveyancers is, to extend covenants for the title to the acts of the last purchaser, yet the Court of Chancery appears to hold, that a person not claiming by purchase is only bound to covenant against his own acts, and those of the person immediately preceding him. See 3 Atk. 267. 3 Ves. Jun. 236. The rule however established by practice is undoubtedly the most reasonable, as every purchaser is certainly entitled to a regular chain of covenants for the title.

With respect to the remedies under the covenants usually entered into by vendors if the purchaser is evicted by any person claiming under the vendor, or any of his ancestors, he may maintain an action at law upon the covenant for damages. And where a defect is discovered in the title, which can be supplied by the vendor, the purchaser may file a bill in equity for a specific performance of the covenant for further assurance. And a vendor who has sold a bad title will, under this covenant, be compellable to convey any title he may have subsequently acquired, though he purchased such title for a valuable consideration. *Taylor v. Debar*, 1 Ch. Ca. 274. 2 Ch. Ca. 212. *Seaborne v. Powell*, 2 Vern. 211. So, if the vendor become bankrupt, the purchaser may call upon his assignees to execute further assurances, although the vendor was only tenant in tail, and did not suffer a recovery. *Pye v. Durbuz*, 3 Bro. C. C. 595. The Court of Chancery however, will in no case compel the performance of a covenant for further assurance, unless the transaction was free from all objection, (*Johnson v. Nott*, 1 Vern. 271.) Therefore if the conveyance was obtained by fraud or by undue influence, or if there should be any other ground on which a Court of Equity would set aside the deed at the instance of the vendor, in such case the Court would not enforce a specific performance of the covenant for further assurances at the instance of the grantee.

It has been determined, that an action of covenant does not lie against a devisee upon the statute of fraudulent devisees, 3 W. & M. c. 14; the remedy given by that statute being confined to cases where an action of debt lies. *Wilson v. Knubley*, 7 East, 127. An action for breach of a covenant for title, will not be barred by the bankruptcy and certificate of the covenantor, although the cause of action accrued before the bankruptcy. *Hammond v. Toulmin*, 7 T. R. 612. *Mills v. Auriel*, 1 H. Bl. 433. 4 T. R. 94. [See the act of the 49 Geo. 3. c. 121. s. 19. relative to covenants by lessees who become bankrupts.] Where there is any fraud or concealment practised by the vendor, the purchaser may bring an action on the case, in the nature of an action of deceit. But a judgment obtained after the death of the vendor, in an action of this kind, can only charge his personal property as a simple contract debt, and will not, except under very particular circumstances, affect his real assets, therefore a bill in chancery will, in most cases, be found a better remedy: it will lead to a better discovery of the fraud, and the circumstances attending it. In cases of fraud, as by concealing an incumbrance or defect in the title, the vendor will be liable to repay the purchase-money or the amount of the incumbrance, though his covenants did not extend to such incumbrance or defect. But where there is no fraud, and a purchaser is evicted, and the covenants do not reach the cause of eviction, or in other words, if the express covenants for the title be not broken, the purchase money cannot be recovered back at law. *Bree v. Holbeck*, Doug. 654. And a court of equity proceeds in cases of this kind, upon the same principle as a court of law, for unless there is fraud in concealing the defect in the title, &c. the court will not interfere. See 1 Fonbl. Tr. Eq. 379. n. (h). *Urnston v. Pate*, in Ch. 1st. Nov. 1794.

With respect to the persons who are bound to enter into covenants for the title, it may be observed

during the coverture, and he, or she that doth not seal doth notwithstanding accept of the estate and occupy the lands conveyed or demised; in these cases, as touching all inherent covenants, as for payment of rent, and the accessaries thereof, as clauses of distress, of re-entry, of *nomine pence*, reparations and the like, they are bound by these covenants as much as if they do seal the deed. So if a lease be made to *A.* for years, or life, the remainder to *I. S.* in fee, and there is a rent reserved, or there be diversa covenants on the part of the grantees, and *I. S.* doth never seal the deed or counterpart; yet if in this case he accept the estate after the death of *A.* he must pay the rent and perform all the covenants that are inherent. So also if there be covenants in the King's patent to be performed on the part of the patentee. As if there be this clause in the patent [and that *I. S.* (the patentee) shall repair the house when it is decayed;] in this case the patentee is bound by this covenant, and all such like covenants. But *quere* of collateral covenants in the first cases, for therein it seems the feoffee or lessee is not bound. And yet it is said, that if an indenture * be made between *A.* of the one part, and *B.* and *C.* of the other part, and therein there is a lease made by *A.* to *B.* and *C.* on certain conditions, and *B.* and *C.* are bound to *A.* by the indenture in twenty pounds to perform the conditions, and *B.* only doth seal the deed and not *C.*; yet in this case if *C.* accept of the estate he is bound by the covenants, and one of them cannot be sued without the other whiles they are both living. *Qui sentit commodum sentire debet et onus. Et transit terra cum onere.*

* P. 178.

Experientia.
Pasc. 14 Jac.
B. R. Bret &
Cumberland's
case.

Co. super Lit.
231.

Heir.

If a man covenant for him and his heirs to do any thing whatsoever; hereby his heirs are bound (e). But otherwise except the heirs be bound by the deed by express name, an heir shall scarcely be bound or charged in any case by a deed. And therefore it is that if the lessee for years be ousted by any other but the heir himself, no action of covenant will lie against the heir, unless there be an ex-

Co. 5. 17.
Bro. Covenant
38. 32 H. 6.
32. Dier 257.
Fitz. Covenant
31.

in general that all persons who convey lands whereof they are seised to their own use, are bound to enter into the usual covenants for the title of the lands conveyed. But where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, &c. and the residue is given over, a purchaser is not entitled to any covenants for the title, because no line can well be drawn as to the *quantum* which would make a person liable to covenant; and therefore, if this rule were not settled, a person who only took 5*l.* might as well be required to covenant, as one who took a large sum. *Wakeman v. Duchess of Rutland*, 3 Ves. jun. 233. 504. affirmed in Dom. Proc. 8 Bro. P. C. 145. and see *Lloyd v. Griffith*, 3 Atk. 264. The same rule applies, where an estate is sold for similar purposes under an order of a court of equity. 3 Ves. jun. 505. 506. In both these cases, therefore, the purchaser is only entitled to a covenant from the vendors, that they have done no act to incumber the estate. But it has always been, and still is, the practice of the profession, to make all the *cestuis que trust*, whose shares are in anywise considerable, join in covenants for the title, according to their respective interests. In conveyances by the crown, a purchaser is not entitled to any covenants for the title; and where an estate is sold by assignees of a bankrupt, the purchaser is only entitled to a covenant from the assignees, that they have done no act to incumber. But the bankrupt usually enters into covenants for the title; and he is always made a party to the conveyance of his estate, to prevent the difficulty which the purchaser might otherwise experience in proving the title.

(e) But the heir is only chargeable so far as he has assets by descent from his ancestor sufficient to answer the charge, 1 P. Wms. 777. Finch Rep. 86.

press

press covenant wherein and whereby the lessor and his heirs are bound. But if he be ousted by the heir himself it seems an action of covenant will lie against him. And yet if he be ousted by an elder title from the lessor, *contra*, for in this case the heir shall not be charged.

10 H. 7. 10.
Dier 19. 14.
Bro. Covenant
30. Dier 114.

If a man do covenant for himself only to pay money, build a house, for quiet enjoying, or the like, and he doth not say in the covenant [his executors, administrators, &c.] yet hereby his executors and administrators are bound and shall be charged (*f*). And yet if a lessee for years covenant for himself to repair the houses demise, omitting other words; it seems in this case he is bound to repair only during his life, and the executors or administrators are not bound (*g*). So if a lessor covenant for himself only to discharge the lessee of all quit rents out of the land; it seems this covenant is only personal, and shall bind the covenantor only during his life. But if in these cases these words [during the term] be added in the covenant, as if a lessee covenant for himself to repair the houses during the term, or the lessor covenant for himself to discharge the lessee of all quit rents during the term; in these cases seems the executors and administrators also will be charged after his death (*h*).

Executors, administrators.

Dier 257.

If a lessee be ousted by one that hath title; it seems an action of covenant will lie for this ouster against the executor or administrator upon the covenant in law, if he were put out in the life-time of the lessor and not otherwise, for if there be tenant for life the remainder in fee to another, and the tenant for life, by the words [demise or grant] doth make a lease for years and die, and after, he in the remainder doth enter and put out the lessee for years; in this case he cannot upon this covenant in law charge the executors or administrators of the lessor (*i*). But upon an express covenant for quiet enjoying he may (*k*).

Co. 5. 16.

In some cases an assignee shall be charged though he be not * named, and in some cases shall not be charged though he be named, and in some cases he shall be charged when he is named (*l*); as when the covenant doth extend to a thing in *esse*, parcel of the demise, there the thing to be done is appurtenant and *quodammodo* annexed to the thing, and shall bind the assignee though he be not expressly

Assignees or grantees.

* P. 170.

(*f*) But upon a covenant *implied*, an action of covenant will not lie against an executor. Moor, 74. *Swan v. Scarles*.

(*g*) See the case of *Tilney v. Norris*, 1 Ld. Raym. 553.

(*h*) See accordingly, Gilb. Covenants, 331.

(*i*) The estate of both the lessor and lessee being determined, the lessee is no longer liable to pay rent under the lease, and the implied covenant for quiet possession only continues during the lessee's liability to the payment of rent.

(*k*) In what cases the heir, or executors, shall be bound by express covenant of the testator without naming them, and when an action will lie against them, see Vin. Abr. Covenant (D.) Gilb. Covenants, 327. Com. Dig. Covenant (C.) Bac. Abr. Covenant (E.)

(*l*) And where covenants run with the land, the assignee shall have the benefit of them although he is not expressly named. And where they run with the land, the heir may have the benefit of them although not expressly named. As where in a lease for years the lessee covenanted with the lessor (who was seized in fee), his executors and administrators (omitting heirs) that he would repair the premises: And it was held that the lessor's heir might maintain an action on the covenant; for being annexed to the land it went to the heir though not expressly named. *Laugher v. Williams*, 2 Lev. 92.

named,

named, as a covenant to repair, &c. (m). But if the covenant be annexed to a thing not in *esse* before, but *de novo* to be erected on the thing, as to set up a new house, or the like; in this case, it will not bind the assignees unless they be named in the covenant. And if the covenant be to do a thing merely collateral; in that case it will not bind the assignees albeit they be named expressly (n). Also when a contract is personal only, and a man doth bind himself and his assigns; his assigns shall not be bound hereby: as if one demise sheep, or other stock of cattle, or any other personal goods, for any time, and the lessee doth covenant for him and his assigns, at the end of the term to deliver them in as good plight as they were at the time of the demise, or such a price for them, and the lessee assign

(m) Upon the act of the 6th of *Ann. c. 31*, (which exempts all persons from actions for accidental fire in any house, except in the case of special agreements between landlords and tenants) it was at one time doubted whether a tenant who had covenanted to repair *generally* (without any exception of damage by fire) was liable upon the covenant, even at law, in case of the house being accidentally destroyed or injured by fire. It is however now settled that he is liable; (*Bullock v. Donumett*, 6 T. R. 650.) and it would appear that a court of equity will not interfere and restrain the lessor from proceeding at law, *Holtzapfel v. Baker*, 18 Ves. 115. And where a lessee enters into such general, unrestrained covenant to repair, he will be liable where the house is destroyed by lightning or other inevitable accident, or by the King's enemies. See 2 Com. Rep. 627. 2 Show. 401. Co. Litt. 37 a. n. 1. Where, therefore, it is not intended that the lessee should be liable for accidents by fire, or for any other inevitable accidents, an express exception of "accidents by fire and other inevitable accident" should be inserted in the covenant to repair: And if it is intended that he should not be liable to pay rent in case the house is destroyed by fire or by any other inevitable accident, in that case a similar exception should be contained in the covenant for payment of the rent; for where there is no such exception, the lessee will be bound to pay his rent during the whole term although the house should be destroyed; and a court of equity will afford no relief; (*Holtzapfel v. Baker*, supra,) unless there should be a covenant on the part of the lessor to repair or to insure, in either of which cases a court of equity, it is apprehended, would require the lessor to rebuild the house within a reasonable time, or would restrain him from receiving the rent.

(n) Mere collateral covenants that run with the land, that is, which extend to something in *esse* parcel of the demise, and affect the estate, lie between all those who are privy in tenure or contract, though not named, like debt for rent at common law. And the reason is, because usually the rent is more, or less, accordingly; *et qui sentit commodum sentire debet et onus*. So a collateral covenant to be done upon the land, as to build *de novo*, shall bind the assignee by express words; because he is to have the benefit of it. Treatise on Equity, 39. See more amply on this subject the points resolved in *Spencer's case*, 5 Co. 16. Also Mod. 399. Cro. Eliz. 437. Roll. Abr. Covenant (L.) Agreeably to the doctrine, that where a covenant runs with the land the lessee is bound by it, if a lessee assigns his lease by way of mortgage, the mortgagee (as assignee) is liable to the payment of the rent and the performance of the covenants as much as if he had been an absolute assignee. See what was said by Lord Ellenborough in *Turner v. Richardson*, 7 East's T. R. 341, and by Lord Kenyon in *Stone v. Evans*, and *Westerdall v. Dale*, cited *ibid.* denying the necessity of an actual entry by a mortgagee of leasehold in order to render him liable to the performance of the covenants, as laid down in the case of *Eaton v. Jaques*, Dougl. 438. In the case of *Lucas v. Comerford*, 3 Bro. C. C. 163, and 1 Ves. jun. 255, Lord Thurlow, at the instance of the lessor, directed that an equitable mortgagee, by a deposit of the lease, should take an actual assignment of it, in order to subject him at law to the performance of the covenants: But it may perhaps be thought that this is a decision which cannot be well supported; for there may be reason to contend, that if an equitable mortgagee is satisfied without the legal estate, that neither the mortgagor or any other person has a right to force it upon him. [In mortgages of leaseholds it is the best way for the mortgagee not to take an assignment of the lease, but a demise of the property for two or three days short of the term.] Though the assignee of a term is bound to perform such covenants as run with the land, yet he is only liable to be sued for such as are broken whilst he continues assignee, and therefore if he assigns to another, he will get quit of all liability for the breach of such as are first broken after he assigns; and in order to get quit of future liability he may assign to any one, and a court of equity will not restrain him from assigning even to an insolvent or a pauper, unless the lessor was willing to accept of a surrender from the assignee in which case the Court, it is conceived, would restrain him from assigning to a pauper or insolvent. See *Vaillant v. Dodomde*, 2 Atk. 546. But though an assignee by assigning over will get quit of all liability for covenants broken after he assigns, yet the lessee himself still continues liable notwithstanding he assigns.

them;

them; in this case, this covenant will not bind the assignee: but the executors and administrators of the first lessee are bound hereby. So if one demise a house and land, with a stock or sum of money for years, rendering rent, and the lessee doth covenant for him and his assignees to deliver the money at the end of the term; in this case an assignee shall not be bound by this covenant, as the executors and administrators of the lessee shall. Executors.

Co. 5. 17.
Dier 27. Bro.
Descent 30.

If a lessee covenant to repair the houses demised, or to discharge the lessor *de omnibus oneribus circa terram*, or the like; in these cases, and such like, albeit assignees be not named in the covenant, yet assignees, and assignees of assignees, *in infinitum*, and all others that shall come to the land by the act of law, or by the act of the parties, shall be bound and charged by this covenant.

Co. 5. 17.

If a lessee covenant for him and his assigns to build a new house upon the land demised, within seven years, and the lessee assign it over: in this case, the assignee is chargeable (o). But if a man covenant for him and his assigns to make a feoffment, obligation, or the like, in this case the assignee shall not be charged albeit he be named. And if the lessee covenant for himself, or for himself, his executors and administrators, only to build a new house upon the land demised, and the lessee assign over the land; in this case the assignee is not bound by this covenant. +

Thin's case v.
Chomsley,
Trin. 36 El.
C. R.

If a lease be made rendering rent, and if it be in arrear that the lessee his executors and assigns shall forfeit three shillings and four pence *nomine pene*, and the lessee assign the term; in this case it seems the assignee shall be charged with the *nomine pene*.

Bro. Covenant
22.

And in all the cases before, where a covenant is broken, an action of covenant may be brought (p). But herein note, that howsoever in divers of the cases before, assignees are chargeable upon a covenant, yet the lessee himself is not hereby discharged, but the lessor or grantee of the reversion hath election to charge which of them he will. Election.

Hil. 16 Jac
B. R. Curia,
Bret v. Cum-
berland.

And therefore if a lessee covenant for him and his assigns to repair, and the lessee assign; in this case the lessor may have his action of covenant against either of them. And if a lessee covenant for him, his executors, administrators, and assigns, to repair the houses demised, and he in reversion doth grant away his reversion, and the lessee assign his estate; in this case, albeit the grantee of the reversion have accepted the rent of the assignee of the term, yet he may still have an action of covenant against the executor P. 180.

(o) If the assignment is made within the seven years, but not otherwise. Lessee covenanted for him and his assigns to rebuild and finish a house within such a time, and after the time expired the lessee assigned over the premises, the house not being built and finished according to the covenant. The covenant shall not bind the assignee, because it was broke before the assignment: *aliter* if broke after, as if the lessee had assigned before the term for building expired. Per Holt, C. J. 1 Salk. 199. S. P. 3 Burr. 1271.

(p) If a covenant is to make an estate in land, a suit in equity is most proper, because a court of equity can give the thing itself, which is a higher and more adequate remedy than damages only, which is all the law gives. Per Lord Hardwicke, 5 Atk. 87. in the case of *Furnival v. Crew*. See that case, and further when remedy may be had in equity upon a covenant. Com. Dig. Chancery (2 X. 6.) of

of the lessee upon this covenant (q). So if a patentee covenant for him and his assigns to repair, and he assign: the King may have his action against either of them (r).

If A. and B. do covenant for themselves jointly, without more words; the covenant is joint, and ~~one~~ of them cannot be charged without the other. But if they covenant for themselves severally, the covenant is several, and they may be sued apart. And if they covenant jointly and severally; then the covenant is joint and several, and they may be sued either way at the election of the covenantee (s). Co. 5. 23.

10. Where a covenant shall be said to be gone and discharged; and when not; and how.

Where the deed itself wherein the covenants are contained, or the estate, ~~on~~ which the covenants as accessory to the principal do depend, is gone and determined, there regularly the covenants are gone also. And therefore if a lease for life or years be surrendered, whereby the estate is gone (t), or a deed become void by rasure or the like, and there be covenants contained in the deed; by these means the covenants are gone also. But this surrender doth not discharge the breach of covenant which was before the surrender. For if a parson lease his glebe for years, and after resign, whereby the lease for years doth become void; in this case the covenants of the lease, as to the time before the resignation, shall be said to be in force still (u). Dier 20. Co. 5. 23.

Where a covenant is become impossible to be done by the act of God, as where one doth covenant to serve another seven years, and he die before the seven years be expired; by this the covenant is discharged (x). 40 E. 3. 27. Bro. Surrender 47. Covenant 42. Hil. 4 Jar. B. R. Moile v. Austin.

Where there is an express covenant in a deed for quiet enjoying, the implied covenant is gone. *Expressum facit cessare tacitum* (y). Co. 4. 80. Plow. 286.

Release.

* P. 181.

By a release of all covenants from the covenantee the covenant is discharged, so as the release be by deed, for a covenant by deed * cannot be discharged by words. And therefore if A. by deed covenant with B. to build a house by a day, and B. doth wish him to let it alone; this is no discharge of the covenant (z). 18 E. 4. 8.

If the lessor accept the rent of the lessee, or his assignee, after a covenant broken; this doth not discharge the breach of the covenant, but the lessor may sue for it notwithstanding. Pasch. 6 Car B. R. adjudged Batchelor's case.

And so we come to a *Warranty*, being a special kind of covenant, and therefore next in order to be spoken to.

(q) But although he may bring such action against the lessee after acceptance of rent from the assignee, yet he may not demand the rent of the lessee after such acceptance: per *Jermyn*, Just. Sty. 300. *Whitway v. Pissent*. See the same distinction in 1 Sid. 402.

(r) See more amply what covenants bind an assignee, and in what cases covenant lies against him. Vin. Abr. Covenant (L.) (M.) Gilb. Covenant, 333. Bac. Abr. Covenant (E. 3.) and see *supra*, page 179, note (n).

(s) See *supra*, page 166, note (h), respecting joint and several covenants.

(t) With respect to rasure of the covenant, if the rasure was not made by all parties interested, with the intention of destroying the covenant, it is conceived it would still be in force: see *supra*, page 53, note (l), on the subject of the rasure of deeds.

(u) So likewise if a parson, after making a lease, becomes non-resident. Cro. Eliz. 78. 245.

(x) See *supra*, pages 132 and 133, notes (a) and (b), on the subject of conditions becoming impossible by the act of God.

(y) See *supra*, page 160, note (c).

(z) See fully in what cases and in what manner covenants shall be said to be suspended, defeated, discharged, or void, in Bac. Abr. Covenant (G.) Gilb. 470. 1 Wood. 397. 429. Com. Dig. Covenant (F.) Chancery (2 X. 3.) Vin. Abr. Covenant (O.)

CHAP. VIII.

OF A WARRANTY.

Finchley 39.
Co. super Lit.
365.

A WARRANTY (a) is a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same (b). Or it is where a man is bound to warrant the land or hereditament that another hath. And he that doth make this warranty is called the warrantor; and he to whom it is made, the warrantee.

1 Warranty.
Quid.

Co. 1. 2. super
Lit. 365. 4. 81.

There are two kind of warranties. 1. A warranty in deed, or an express warranty; which is when the same is expressed (c); i. e. when a fine, or feoffment by deed, is levied, or made in fee, or a lease for life is made by deed, comprehending warranty, or which hath an express clause of warranty contained in it; as when a conusor, feoffor, or lessor doth covenant to warrant the land to the conusee, feoffee, or lessee; which is in these words: *Ego I. S. & heredes (d) mei warrantizabimus & in perpetuum defendemus W. S. & heredibus suis tenementa predicta contra omnes homines in perpetuum* (e). And by the statute of *Bigamis*,

Warrantor.
Warrantee.
2. Quotuplex.

(a) In the practice of modern conveyancers, warranties are but rarely, if ever, made use of:—COVENANTS may be said to have entirely superseded them; for a covenant, where the covenantor covenants for his heirs binding the heirs where they have assets by descent, and also binding the covenantor's personal representatives, and consequently rendering his personal assets liable in case of a breach of the covenant (and they are not liable in the case of a warranty), and being more easily adapted to the circumstances of many cases which arise than a warranty; a covenant may be said to have most of the advantages of a warranty, and also some advantages which a warranty does not possess. In consequence therefore of the disuse of warranties, the learning on the subject is of much less importance than formerly. Since the time too the *Touchstone* was written, considerable alteration has been made in the law of warranty by the act of the 4 & 5 Ann. c. 16. s. 21., which enacts, that all warranties made after the first day of Trinity Term, 1706, by any tenant for life, of any lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of none effect; and likewise that all collateral warranties which shall be made after the same day in any lands, tenements or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, shall be void against his heir.

(b) And either upon voucher, or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of those that shall be evicted by a former title; or else may be used by way of rebutter. Co. Litt. 365 a.

(c) By the feudal constitution, if the vassal's title to enjoy the fee was disputed he might vouch or call the lord or donor to warrant or insure his gift; which, if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompence. And so by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feudal verb *dedi*, to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were stipulated to be rendered. But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound by the implied warranty and not his heirs; because it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute, no warranty whatsoever is implied; they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty to bind the grantor and his heirs, which is a kind of covenant real, and can only be created by the verb *warrantizo*, or *warrant*. Co. Litt. 384. 2 Bl. Com. 300. See also Fitz. Nat. Brev. 134. Sullivan's Lect. 119.

(d) The word *heirs* is essentially necessary in a warranty, in order to bind the heirs, for without it they are not bound.

(e) See observations on the words of the warranty. Co. Litt. 383 b.

T

Dedi

Dedi is made an express warranty during the life of feoffor. 2. A warranty in law, or an implied warranty; which is, when it is not expressed by the party, but *tacite* made and implied by the law; whereof see divers examples *infra*. The warranty in deed also is either lineal, which is thus described: A covenant real, annexed to the land by him which either was owner, or might have inherited the land, and from whom his heir lineal or collateral might by possibility have claimed the land, as heir from him that made the warranty. Or else it is collateral, which is thus described: A warranty made by him that had no right or possibility of right to the land, and is collateral to the title of the land (*f*). Also there is a warranty which doth commence by disseisin or wrong (*g*); of all

Co. super 383,
384. 370. 365.

(*f*) With reference to lineal and collateral warranty it may be proper to observe, that lineal warranty is where the right to the lands descends *from* or *through* one and the same person with the person who entered into the warranty, and where the right to the lands and the obligation of the warranty meet in one and the same person. As if *A*. tenant in tail, discontinues and dies, leaving *B*. his issue in tail, and also his heir at law. Here the warranty is *lineal*, because the title to the lands come from the same person from whom the obligation of the warranty descends, and both come to or meet in one and the same person. They both in short come in or through one and the same channel or *Nas*, and this it is which appears to constitute *lineal* warranty. In order however to make a warranty lineal, it is not absolutely necessary that the estate should have ever been actually vested in possession in the person entering into the warranty; for if the estate *MIGHT* have vested in him, and the person affected by the warranty is obliged to deduce his title *through* the person who entered into the warranty, that is sufficient to make the warranty *lineal*. Agreeably to the doctrine, that the warranty is lineal, if the right to the lands, and the obligation of the warranty come in one and the same line, it may happen that *lineal* warranty may descend upon a *collateral* heir.—Thus if a nephew claim lands as heir-at-law to his uncle who entered into the warranty, here the right to the lands and the obligation of the warranty come *from* one and the same person to one and the same person, or in one and the same line; and therefore the warranty is lineal, notwithstanding it descended upon a collateral heir.

A collateral warranty is where the right to the lands come from or through one person, and the obligation of the warranty devolves from another; or, in other words, where they come through different channels. Thus if a person seised in tail discontinues and dies without issue, leaving *A*. his heir at law, who is entitled to the lands in *remainder* as a purchaser. In this case *A*. does not derive his right to the lands from or through the person who entered into the warranty; and therefore the right to the lands and the obligation of the warranty being derived in different lines the warranty is collateral;—that is, the warranty is collateral to or does not come in the same line or channel with the right to the lands. And as a warranty, as we have before seen, may be *lineal*, though the obligation of it descend from a *collateral* ancestor, so warranty may be collateral, though the obligation of it may descend from a lineal ancestor; for it is, in fact, deriving a right to the lands through a *different* course or channel from the one through which the obligation of the warranty comes, that renders a warranty collateral. Thus if a father tenant for life, with remainder to his eldest son and heir in tail, should alienate with warranty and die, there although the obligation of the warranty devolves upon the heir from a lineal ancestor, yet as the right of the heir to the estate is not derived from his father, but in another line, the warranty is collateral. Before quitting the subject of the present note, it may be proper to observe, that there is an important distinction between lineal and collateral warranty; which is, that lineal warranty is only binding where real assets descend from or through the ancestor who enters into the warranty; whilst collateral warranty binds even without assets; though since the above noticed act of *Anne*, collateral warranty is only binding where entered into *by a tenant in tail in possession*. The legislature, it is presumed, allowed it still to be binding in this case, because the person entering into the warranty might, by a recovery, have barred the remainder-man upon whom the obligation of the warranty descends. A collateral warranty therefore may, in some cases, happen to be as good a bar to a remainder as a recovery would have been; and consequently in such a case there may be a marketable title to the estate without a recovery: but in the case of a lineal warranty devolving upon the issue in tail of the warrantor, the title can in no case, by virtue of the warranty, be considered as good, even though there were assets; for, as will be seen in the text, lineal warranty with assets is not binding upon any succeeding issue in tail after the assets are alienated. It is however to be understood, that the person alienating the assets will himself still be bound. In order to constitute *assets* it may be proper to notice, that the lands must be fee-simple lands of at least equal value with the lands warranted;—that they must be descended from the warranting ancestor, and must be vested in possession, and not merely in right.

(*g*) A warranty commencing by disseisin (or by abatement, intrusion, &c.) is where a disseisor alienates the estate with warranty, and such warranty *having its origin in a wrong* is held to be no bar to

all which *see divers examples afterwards. And note that all these things here are to be applied to warranties of lands, and concerning freeholds and inheritances; for there is a warranty of goods and chattels in contracts, of which we treat not here (*k*).

*P. 182.

Co. super Lit.
265. 372. 365.
384.
Co. 4. 121.
10. 97.

The fruit and effect of the warranty in deed is, that it doth always conclude and bar the warrantor himself of the land so warranted for ever; so that all his present and future rights, that he hath or may have therein, are hereby extinct. And therefore if the father be disseised, and the son in his life-time release all his right to the land to the disseisor, and make a warranty of the land in the deed, and then the father dieth, and the right of the land descendeth to the son; in this case, albeit the release doth not bar the son, yet the warranty doth bar him. And for the most part also it doth conclude and bar the heirs of him that made the warranty, to whom the same warranty doth descend, to demand the same land against the warranty; for if it be a lineal warranty, it is a bar of an estate in fee-simple without any assets, *i. e.* without any other land descended to him in fee-simple from the same ancestor that made the warranty: And with assets it is a bar of an estate in tail. And if it be a collateral warranty, it is, with or without assets, a bar of an estate in fee-simple or fee-tail, and all possibility of right thereunto (*i*); and yet so as it doth not pass any estate or right, but only bind the right, so long as the warranty is in force; for if the warranty be avoided the right may be revived. But neither the lineal nor collateral warranty can enlarge an estate. And therefore if a lessor by deed release to his lessee for life, and warrant the land to him and his heirs; this doth not make his estate greater, neither will it bar titles of entry, or action, in cases of mortmain, consent to a ravisher, mortgage, or dower. And therefore if an ancestor of the lord hath title to enter upon an alienation in mortmain, and he release, or make a feoffment with warranty; this warranty will neither bar him nor his heir. So if a collateral ancestor will make a warranty, which doth after descend upon one that hath title of entry upon a condition broken; this will not bar his entry, &c. neither will it bar any right that shall commence after the warranty made. And the warranty that doth commence by

3. The fruit and effect of it, and what use may be made of it.

Co. super Lit.
389, &c.

to persons injured by the disseisin. As however between the parties to the warranty and their heirs it is good. See 1 Inst. 367 a. And where an estate commencing by disseisin is turned to a right, and a warranty is annexed to the estate upon an alienation, or upon a release or confirmation of right, and such warranty is made by any *other* person than the disseisor himself, *there* the warranty will not be open to the objection of being a warranty commencing by disseisin. Litt. sect. 697. It is said that a warranty even by the disseisor himself is not a warranty commencing by disseisin, provided the disseisin was not made *with an intention* to create the warranty. But it may be asked, how is the *intention* to be ascertained except by the subsequent fact of his creating the warranty; or if it is to be ascertained by the time which elapses between the disseisin and entering into the warranty, then the question arises, where is the line to be drawn between the period which shews that the disseisin was made with an intention to alienate with warranty, and the period which shews that such was not the intention? See on this subject page 191, *infra*.

(A) See further as to the several kinds of warranties, Bac. Abr. Warranty (A). Com. Dig. Warranty (H). Sull. Lect. 120. 1 Wood, 335.

(i) See the above noticed act of the 4 & 5 Ann. c. 16. (note (a) p. 181.) which greatly narrows the operation of collateral warranty.

disseisin doth not bind or bar any estate with or without assets (*k*).

And in cases where the lineal or collateral warranty is a bar, there if the party be impleaded by him or his heirs that made the warranty, the party impleaded that is tenant of the land, may plead and shew forth this warranty against him, and demand judgment, whether he contrary to his own warranty shall be suffered or received to demand the thing warranted; and this in pleading is called a rebutter (*l*). And if he be impleaded or sued by another for the land, then he to whom the warranty is made, or his heirs, may vouch, i. e. call in the warrantor or his heirs, to warrant the land. And this is an interpleader, in the nature of an action brought by the warrantor against the warrantee, wherein he that doth vouch (called the voucher) is demandant, and he that is vouched (called the vouchee) is made tenant or defendant to the action, and the voucher is, as it were, out of the suit. And this second tenant, the vouchee, is called the tenant by the warranty. And hereupon shall issue forth to the sheriff a writ to summon the vouchee to appear, called a *Summons ad warrantizandum*. And if the vouchee appear he must plead to the voucher, and if he shew cause why he should not warrant, that must be tried; and this shewing of cause is called a counterplea to the voucher: but if he plead in avoidance of the warranty, it is called a counterplea to the warranty. And if he cannot gainsay the warranty, the stranger shall recover the land demanded against the voucher, and he shall recover as much other land against the vouchee of the lands he hath or had at the time of the voucher. And this recovery of other land is called a recovery in value. And if the vouchee hath at the time of the voucher and recovery no lands descended to him to answer the warranty, but hath afterwards land happening to him by descent from that ancestor, then he may have a resummons, and recover the land that doth after happen. But if the sheriff return upon the summons, that the vouchee is summoned, and he doth make default, then he shall have a *magnum cape ad valentiam*; when if he make default again, the judgment shall be given against the voucher, and he shall recover over in value against the vouchee; and if the vouchee appear, and then make default, the voucher shall have a *parvum cape ad valentiam*; and then if he make default, judgment shall be given as before. But if the sheriff return upon the summons, he hath nothing whereby he may be summoned, then may the voucher have a writ called *Sequatur sub suo periculo*; whereupon shall go an *Alias* and *Pluries*; and if the like return be made, the demandant shall have judgment against the first tenant, but he cannot recover in value against the vouchee. And if the case be so, that the vouchee had a warranty from some other for the land, he

Co. super Lit.
265. Co. 10.
98, 99. Dier
42. Co. super
Lit. 101.

Rebutter.

Quid.

* P. 183.

Voucher.

Quid.

Voucher.

Vouchee.

Tenant by the
warranty.

Quid.

*Summons ad
warrantizan-
dum.*

Quid.

Counterplea to
the voucher.

Quid.

Counterplea to
the warranty.

Quid.

Recovery in
value.

Quid.

*Sequatur sub
suo periculo.*

Quid.

(k) See supra, page 181, note (f), on the subject of collateral warranty.

(l) For the derivation and explanation of rebutter, see Co. Litt. 303 b. 365 a. Com. Dig. Warranty (K. S.) Pleader (K.) Vin. Abr. Voucher (A. c. 3.)

may de-arraigne, i. e. maintain the warranty over, and shall recover in value over also against his voucher in the same manner as before.

De-arraignment del Warranty. Quid.

F. N. B. 134.
Co. super Lit.
102.

Or the warrantee to whom the warranty is made, or his heirs, may at any time before they be impleaded for the land, if they will, bring a *warrantia chartæ* upon the warranty in the deed against the warrantor or his heirs; and hereby all the land, the heir of the warrantor hath by descent from the ancestor that made the warranty, at the time of this writ brought, shall *be bound and charged with the warranty, into whose hands soever it go afterwards; so that if the land warranted be after recovered from the warrantee, he shall recover so much land over again of the other land of the heir of the warrantor, or of the warrantor himself if he be living. And albeit the warrantee or his heirs do recover in this writ, yet he may after upon occasion vouch the warrantor or his heirs notwithstanding. And herein observe it is good policy, if a man suspect any thing, to bring this writ of *warrantia chartæ* betimes; because it binds all the land of the warrantor from the time of the writ brought, and not any of his other lands he had before that time that are now aliened (m).

Warrantia chartæ. Quid.

* P. 184.

Co super Lit.
383, 384.
Co. 4. 81.

The words *dedi & concessi*, or *dedi* only, in a feoffment do make a warranty, when an estate of frank-tenement or inheritance doth pass by the deed. But the word *concessi* only, or *demisi & concessi*, do not make such a warranty. And by force of the statute of *Bigamis*, chap. 8, *dedi* is made an express warranty during the life of the feoffor (n).

4. What words and clauses in a deed will make a warranty: or not.

Lit. sect. 753.
Co. 3. 17, 18.

The word, *warrantizo*, or *warrant*, is the only apt and effectual word to make an express warranty, or a warranty in deed, and therefore this word only is used in fines. And the words *defendo*, or *acquieto*, albeit they be commonly used in deeds, yet of themselves without the other will not make a warranty (o).

Dier, 42. Co.
super Lit. 383.

If a man by deed doth grant to warrant land to *I. S.* and his heirs, and the warrantor doth not bind his heirs to the warranty; or doth not warrant to *I. S.* and his heirs, but to *I. S.* only; or doth warrant to *I. S.* and his assigns, and not to *I. S.* and his heirs; or doth bind himself and his heirs to warrant the land, but doth not say how long,

(m) Upon what warranty this writ lies, by whom it may be had, and when, and how it was to be brought, see Vin. Abr. tit. *Warrantia Chartæ*. Bro. Abr. same title. Fitz. Nat. Brev. 134, with the notes to the last edition; and Com. Dig. Pleader (3 N).

(n) It was at one time a prevailing opinion that the word *grant* in any conveyance created a warranty, and in consequence of such opinion trustees were advised not to convey by the word *grant*; but it now seems to be agreed that this word, when used in a conveyance of an estate of inheritance, does not imply a warranty. And even where the word may contain an implied warranty, yet the insertion in the deed of any express covenant on the part of the grantor, would clearly restrain the effect of the warranty and bring it within the effect of the covenant; or, more properly, perhaps, the express covenant would annul the implied warranty and leave the grantor only liable on his covenant. See, on this subject, a valuable note of Mr. Butler's to Co. Litt. 348 a. (1); and see supra, page 160, notes (b) and (c), as to implied covenants (or warranty) being restrained by express ones.

(o) See Mad. Form. Angl. 77. in p. 43, and for the forms of warranties, the references in the index of that book, under the word "warranty."

5. To what things a warranty may be annexed and extended : and to what not : and how.

nor against whom; these are good warranties, but how they shall be taken, see afterwards.

A warranty in deed may be annexed to estates of inheritance or freehold; and that not only of corporal things which pass by livery, as houses, lands, and the like, but also of incorporeal things which lie in grant, as advowsons, rents, commons, estovers, and the like, which issue out of lands or tenements; and that not only to inheritances in *esse*, but also to such as are newly created, as a man (some say) may grant a rent, &c. *de novo* out of land for life, in tail, or in fee, with warranty. So a warranty in law may extend to a rent newly created; and therefore if such a rent be granted in exchange for an acre of land, this exchange and warranty thereunto annexed is good. But a warranty may not be annexed to an estate or lease for years, albeit it be a lease of one thousand years, nor to any other chattel, and therefore in all actions the which lessee for years may have as trespass, &c. a warranty cannot be pleaded in bar (p).

Co. super Lit.
366. 389.

P. 185.

A warranty may be made upon any kind of conveyance, as upon fines, feoffments, gifts, &c. also a warranty may be made by and upon releases and confirmations, made to the tenant of the land, albeit he that makes the release or confirmation hath no right to the land, &c. And yet some say, that by a release or confirmation, where there is no estate created, or transmutation of the possession, a warranty cannot be made to the assignee. But if *A.* be seised of land in fee, and *B.* doth release to him, or doth confirm his estate in fee, with warranty to him, his heirs and assigns; in this case all men agree this warranty to be good; and so also it seems it is in the case last before, and that both the party himself, and the assignee may vouch (q).

Co. super Lit.
372. 385. Lit.
sect. 738. 743.
706.

6. What shall be a good warranty in law : and how it shall bar and bind.

A warranty in law may be good in its creation, albeit it be made without deed; for if a man by his last will and testament devise lands to another man for life, or in tail, rendering rent; to this estate there is a warranty in law annexed (r).

Co. super Lit.
384. 386.

The words *dedi & concessi*, or *dedi* only in a feoffment, make a good warranty in law. But the word *concessi* only in fine or feoffment, doth not make a warranty in law. And albeit there be an express warranty in the deed, yet this doth not take away the implied warranty of the law (s). And this warranty in law by *dedi & concessi*, or by *dedi* only, is a general warranty during the life of the feoffor.

Co. super Lit.
384. F. N. B.
134.

Co. 4. 80.

Partition. Exchange.

Every partition and exchange implieth in it, and hath annexed to it, a special warranty in law : how it shall bar and be extended, see in *Exchange*.

Co super Lit.
102. 384.

(p) But a purchaser of goods and chattels may have a satisfaction from the vendor if he sells them as his own, and the title proves deficient, though there is no express warranty for that purpose. *Cro. Jac.* 474. 1 *Roll. Abr.* 90. See fully as to warranty of goods and chattels in *Bac. Abr.* tit. Actions on the Case, (E). and *Stile's Prac. Reg.* 656.

(q) See further as to what things, and in what manner, warranties may be annexed, in *Bac. Abr.* Warranty, (B). *Vin. Abr.* Voucher, (B. 6). *Com. Dig.* Garranty, (E).

(r) Warranties in law are so called, because in judgment of law they amount to a warranty without the verb *warrantizo*. *Co. Lit.* 384 a.

(s) *Quare* of this; and see *supra*, page 184, note (n).

Every

Co. 4. 80.

Every tenure by homage ancestral, *i. e.* where a tenant and his ancestors have held land of a lord and his ancestors, time out of mind by homage, hath a warranty in law annexed to it, by which the lord is bound to warrant it to the tenant and his heirs.

Co. super Lit.
334.

If one make a gift in tail, or lease for life of land, by deed, or without deed (*t*), reserving a rent, or of a rent-service by deed; in these cases, there is annexed an implied warranty against the donor or lessor, his heirs and assigns.

Co. super Lit.
384.

When dower is assigned to a woman, there is a warranty in law included, which is, that the tenant in dower being impleaded, shall vouch and recover in value a third part of the two parts whereof she is dowable.

Co. super Lit.
384.

And this warranty in law is of the nature of a lineal warranty, and shall bind as a lineal warranty only, for it doth never bar any collateral title. And hence it is, that this warranty and assets in some cases is a good bar; as, if tenant in tail exchange for other lands which are descended to the issue, and he hath accepted of them, or if not, that other lands are descended to him. But if tenant in tail of lands, make a gift in tail, or lease for life, rendering rent, and * die; in this case this is no bar. And yet if other assets in fee-simple descend, this warranty in law and assets is a good bar (*u*).

* P. 186.

Co. super Lit.
367.

To every good warranty in deed, that must bar and bind, these things are requisite. 1. That the person that doth warrant, be a person able: for if an infant make a feoffment in fee of land, and thereby doth bind him and his heirs to warrant the land; in this case, albeit the feoffment be only voidable, yet the warranty is void. 2. That the warranty be made by deed in writing: for if a man make a feoffment by word (*x*), and by word bind him and his heirs to warrant the land; this is not a good warranty. So if a man give lands to another by his last will, and thereby bind him and his heirs to warrant it; this warranty, albeit the will be in writing, is void (*y*). 3. That there be some estate to which the warranty is annexed, that may support it: for if one covenant to warrant land to another and make him no estate, or make him an estate that is not good, and covenant to warrant the thing granted; in these cases the warranty is void. 4. That the estate to which the warranty is annexed, be such an estate as is able to support it; and therefore that it be a lease for life at the least: for if one make a lease for years of land, and bind himself and his heirs to warrant the land; this is no good warranty, neither will it have the effect of

7. What shall be said a good warranty in deed: or not: and how it shall bar and bind.

Infant.

Lit. sect. 703.
Co. super Lit.
386.Co. 10. 96. &
super Lit. 384.Co. super Lit.
378. 26 H. 8. 9.

(*t*) Since the Statute of Frauds, (29 Car. 2. c. 3.) a gift in tail cannot be made without a writing.
 (*u*) See more amply in what cases the law will create a warranty, Vin. Abr. Voucher, (A. 2). Bac. Abr. Warranty, (E).
 (*x*) See the above noticed statute of the 29 Car. c. 3, since which a feoffment cannot be made without a writing.
 (*y*) Because a will in writing is no deed, and therefore an express warranty cannot be created by will; but a warranty in law may be created by will, and may bind the heir, though it never bound the ancestor. Co. Lit. 386 a.

a warranty:

a warranty: but this may amount to a covenant, on which an action of covenant may be brought. 5. That the warranty descend upon him that is heir of the whole blood by the common law to him that made the warranty, and not upon another: for if tenant in tail in borough English (where by custom the youngest son is to inherit) discontinue the tail, and have issue two sons, and the uncle release to the discontinuee with warranty, and dieth; this is no good warranty to bind the younger son (z). So if in this case, tenant in tail discontinue the tail with warranty, &c. having two sons, and die seised of other lands in the same borough in fee-simple, to the value of the lands in tail; the younger son is not barred by this warranty. So if one give his land to the eldest son, and the heirs males of his body, the remainder to the second son, &c. and the eldest son doth alien with warranty, having issue a daughter, and die; this is no good warranty to bar the second son. So if tenant in tail have issue two daughters by divers venters and die, and they enter, and a stranger doth disseise them, and one of them doth release all her right, and bind her and her heirs to warrant it; in this case the warranty is not good to bar the sister: but if they had been by one venter, *contra*. So if two brothers be by demy venters, and the eldest doth release with warranty to the disseisor of the uncle, and dieth without issue, and the younger dieth; this is no good warranty to bar the younger brother, for a warranty must *evermore descend upon him that is heir at the common law to him that made it (a). 6. That he that is heir do continue to be so, and that neither the descent of the title, nor the warranty, be interrupted: for if one bind him and his heirs to warranty, and after is attainted of treason or felony, and die; this warranty doth not bind his heirs. So if tenant in tail be disseised, and after release to the disseisor with warranty, and after the tenant in tail is attainted of felony, and hath issue and die; this warranty will not bind the issue. 7. That the estate of freehold that is to be barred be put to a right before, or at the time of the warranty made; and that he to whom the warranty doth descend, have then but a right to the land: for a warranty will not bar any estate of freehold or inheritance in *esse* in possession, reversion, or remainder, that is not displaced, and put to a right, before, or at the time of the warranty made; though after, at the time of the descent of the warranty, the estate of freehold or inheritance be displaced and divested. And therefore if there be father and son, and the son hath a rent service, suit to a mill, rent-charge, rent-seck, common of pasture, or other profit appender out of land of the father, and the father maketh a feoffment in fee with warranty, and dieth, this shall not bar the son of the rent, common, &c. And albeit

Co. super Lit.
12. Lit. fol.
161. sect. 735.

Lit. fo. 161.

Lit. sect. 737.

Co. super Lit.
387. Lit. sect.
718.

Lit. sect. 745.
746.

Co. 10. 96. 97.
super Lit. 388.
21 H. 7.

* P. 187.

(z) Because a warranty cannot go according to the nature of the tenements by the custom, &c. but only according to the form of the common law. Lit. sect. 735.

(a) In the cases above put, the obligation of the warranty does not descend upon the person claiming the estate; and in no case does a warranty bar unless it does so descend. It is not however to be understood, that it is a bar in all cases where it does so descend, for this is by no means the case.

the son after the feoffment with warranty, and before the death of the father, had been disseised, and so, being out of possession, the warranty had descended upon him, yet this warranty should not bind him. So if my collateral ancestor release to my tenant for life, with warranty, and die, and this warranty descend upon me; this shall not bind my reversion, or remainder. But if in the case before, the son be disseised of the rent, &c. and affirm himself to be disseised by the bringing of an assise, (for otherwise he shall not be said to be out of possession of a rent, or the like) and after the father doth release with warranty and die; in this case the collateral warranty shall bind and bar the son of his rent, &c. (b). And if in the last case, my tenant for life be disseised, and my ancestor doth release to the disseisor with warranty, and die; this is a good warranty to bar and bind me. 8. That the warranty doth take effect in life-time of the ancestor, and that he be bound by it: for the heir shall never be bound by an express warranty; but where the ancestor was bound by the same warranty, and therefore a warranty made by will, is void. 9. That the heir claim in the same right that the ancestor doth: for if one be a successor only in case of a corporation, he shall not be bound by the warranty of a natural ancestor (c). 10. That the heir that is to be barred by the warranty, be of full age at the time of the fall of the warranty: for if my ancestor make a feoffment, or a release with warranty, and at this time I am within age, *and after he die, and the warranty descend upon me within age; this warranty shall not bind me: but if I become of age after the warranty of my ancestor, and before his death; in this case the warranty may bar me. And in the first case it will bar me also, while it is in force; but I may by my entry avoid it. And the same law is of a woman covert. And yet if the entry of an infant, or a woman covert, be not lawful, when the warranty doth descend; in this case the warranty shall bind them as well as any other; for such warranty cannot be avoided but by entry and avoiding the estate. And where the husband is within age at the time of the descent of a warranty to his wife, and the entry of the wife is taken away, there the warranty shall bind the wife.

If lands be given to *A.* for life, and after to the next heir male of *A.* and the heirs male of the body of that heir male, and *A.* having issue *B.* makes a feoffment of the land with warranty to *I. S.* this is a good warranty and a bar to the issue (d); for a man may be barred of his right by a warranty which he could never avoid: as, where lessee for life is disseised, and a collateral ancestor of the lessor doth release to the disseisor with warranty and die, and this doth descend upon the lessor; by this he is barred.

* P. 183.

Lit. sect. 734.

Co. super Lit.
370.

Lit. sect. 726.
Co. 1. 67. 140.
super Lit. 380.

Co. 1. 66.
44 Ed. 3. 30.
44 Ass. pl. 35.

(b) See supra, page 181, latter part of note (f), on the subject of collateral warranty.

(c) The warranty of the predecessor does not bind the successor. 2 Inst. 153.

(d) This being a warranty entered into by a person seised of a mere life estate, would now be void under the above noticed act of the 4 Ann. c. 16. s. 21. That the person entering into the warranty must be considered as having a mere life estate, and not an estate tail, see *Archer's case*, 1 Rep. 66. *Check v. Day*, Moore, 593. and *Fearne's Cont. Rem.* 6th ed. p. 150.

Dedi is made an express warranty during the life of feoffor. 2. A warranty in law, or an implied warranty; which is, when it is not expressed by the party, but *tacite* made and implied by the law; whereof see divers examples *infra*. The warranty in deed also is either lineal, which is thus described: A covenant real, annexed to the land by him which either was owner, or might have inherited the land, and from whom his heir lineal or collateral might by possibility have claimed the land, as heir from him that made the warranty. Or else it is collateral, which is thus described: A warranty made by him that had no right or possibility of right to the land, and is collateral to the title of the land (*f*). Also there is a warranty which doth commence by disseisin or wrong (*g*); of all

Co. super 383,
384. 370. 365.

(*f*) With reference to lineal and collateral warranty it may be proper to observe, that lineal warranty is where the right to the lands descends *from* or *through* one and the same person with the person who entered into the warranty, and where the right to the lands and the obligation of the warranty meet in one and the same person. As if *A*. tenant in tail, discontinues and dies, leaving *B*. his issue in tail, and also his heir at law. Here the warranty is *lineal*, because the title to the lands come from the same person from whom the obligation of the warranty descends, and both come to or meet in one and the same person. They both in short come in or through one and the same channel or *line*, and this it is which appears to constitute *lineal* warranty. In order however to make a warranty lineal, it is not absolutely necessary that the estate should have ever been actually vested in possession in the person entering into the warranty; for if the estate *MIGHT* have vested in him, and the person affected by the warranty is obliged to deduce his title *through* the person who entered into the warranty, that is sufficient to make the warranty *lineal*. Agreeably to the doctrine, that the warranty is lineal, if the right to the lands, and the obligation of the warranty come in one and the same line, it may happen that *lineal* warranty may descend upon a *collateral* heir.—Thus if a nephew claim lands as heir-at-law to his uncle who entered into the warranty, here the right to the lands and the obligation of the warranty come *from* one and the same person to one and the same person, or in one and the same line; and therefore the warranty is lineal, notwithstanding it descended upon a collateral heir.

A collateral warranty is where the right to the lands come from or through one person, and the obligation of the warranty devolves from another; or, in other words, where they come through different channels. Thus if a person seised in tail discontinues and dies without issue, leaving *A*. his heir at law, who is entitled to the lands in *remainder* as a purchaser. In this case *A*. does not derive his right to the lands from or through the person who entered into the warranty; and therefore the right to the lands and the obligation of the warranty being derived in different lines the warranty is collateral;—that is, the warranty is collateral to or does not come in the same line or channel with the right to the lands. And as a warranty, as we have before seen, may be *lineal*, though the obligation of it descend from a *collateral* ancestor, so warranty may be collateral, though the obligation of it may descend from a lineal ancestor; for it is, in fact, deriving a right to the lands through a *different* course or channel from the one through which the obligation of the warranty comes, that renders a warranty collateral. Thus if a father tenant for life, with remainder to his eldest son and heir in tail, should alienate with warranty and die, there although the obligation of the warranty devolves upon the heir from a lineal ancestor, yet as the right of the heir to the estate is not derived from his father, but in another line, the warranty is collateral. Before quitting the subject of the present note, it may be proper to observe, that there is an important distinction between lineal and collateral warranty; which is, that lineal warranty is only binding where real assets descend from or through the ancestor who enters into the warranty; whilst collateral warranty binds even without assets; though since the above noticed act of *Anne*, collateral warranty is only binding where entered into *by a tenant in tail in possession*. The legislature, it is presumed, allowed it still to be binding in this case, because the person entering into the warranty might, by a recovery, have barred the remainder-man upon whom the obligation of the warranty descends. A collateral warranty therefore may, in some cases, happen to be as good a bar to a remainder as a recovery would have been; and consequently in such a case there may be a marketable title to the estate without a recovery: but in the case of a lineal warranty devolving upon the issue in tail of the warrantor, the title can in no case, by virtue of the warranty, be considered as good, even though there were assets; for, as will be seen in the text, lineal warranty with assets is not binding upon any succeeding issue in tail after the assets are alienated. It is however to be understood, that the person alienating the assets will himself still be bound. In order to constitute *assets* it may be proper to notice, that the lands must be fee-simple lands of at least equal value with the lands warranted;—that they must be descended from the warranting ancestor, and must be vested in possession, and not merely in right.

(*g*) A warranty commencing by disseisin (or by abatement, intrusion, &c.) is where a disseisor alienates the estate with warranty, and such warranty *having its origin in a wrong* is held to be no bar

all which *see divers examples afterwards. And note that all these things here are to be applied to warranties of lands, and concerning freeholds and inheritances; for there is a warranty of goods and chattels in contracts, of which we treat not here (k).

* P. 182.

Co. super Lit.
265. 372. 365.
384.
Co. 4. 121.
10. 97.

The fruit and effect of the warranty in deed is, that it doth always conclude and bar the warrantor himself of the land so warranted for ever; so that all his present and future rights, that he hath or may have therein, are hereby extinct. And therefore if the father be disseised, and the son in his life-time release all his right to the land to the disseisor, and make a warranty of the land in the deed, and then the father dieth, and the right of the land descendeth to the son; in this case, albeit the release doth not bar the son, yet the warranty doth bar him. And for the most part also it doth conclude and bar the heirs of him that made the warranty, to whom the same warranty doth descend, to demand the same land against the warranty; for if it be a lineal warranty, it is a bar of an estate in fee-simple without any assets, i. e. without any other land descended to him in fee-simple from the same ancestor that made the warranty: And with assets it is a bar of an estate in tail. And if it be a collateral warranty, it is, with or without assets, a bar of an estate in fee-simple or fee-tail, and all possibility of right thereunto (i); and yet so as it doth not pass any estate or right, but only bind the right, so long as the warranty is in force; for if the warranty be avoided the right may be revived. But neither the lineal nor collateral warranty can enlarge an estate. And therefore if a lessor by deed release to his lessee for life, and warrant the land to him and his heirs; this doth not make his estate greater, neither will it bar titles of entry, or action, in cases of mortmain, consent to a ravisher, mortgage, or dower. And therefore if an ancestor of the lord hath title to enter upon an alienation in mortmain, and he release, or make a feoffment with warranty; this warranty will neither bar him nor his heir. So if a collateral ancestor will make a warranty, which doth after descend upon one that hath title of entry upon a condition broken; this will not bar his entry, &c. neither will it bar any right that shall commence after the warranty made. And the warranty that doth commence by

3. The fruit and effect of it, and what use may be made of it.

Co. super Lit.
389, &c.

to persons injured by the disseisin. As however between the parties to the warranty and their heirs it is good. See 1 Inst. 367 a. And where an estate commencing by disseisin is turned to a right, and a warranty is annexed to the estate upon an alienation, or upon a release or confirmation of right, and such warranty is made by any other person than the disseisor himself, *there* the warranty will not be open to the objection of being a warranty commencing by disseisin. Litt. sect. 697. It is said that a warranty even by the disseisor himself is not a warranty commencing by disseisin, provided the disseisin was not made with an intention to create the warranty. But it may be asked, how is the intention to be ascertained except by the subsequent fact of his creating the warranty; or if it is to be ascertained by the time which elapses between the disseisin and entering into the warranty, then the question arises, where is the line to be drawn between the period which shews that the disseisin was made with an intention to alienate with warranty, and the period which shews that such was not the intention? See on this subject page 191, *infra*.

(A) See further as to the several kinds of warranties, Bac. Abr. Warranty (A). Com. Dig. Warranty (H). Sull. Lect. 120. 1 Wood, 335.

(i) See the above noticed act of the 4 & 5 Ann. c. 16. (note (a) p. 181.) which greatly narrows the operation of collateral warranty.

this warranty shall not bind the right of the heir (*m*). So if a collateral warranty be made to a bastard and his heirs, and living the ancestor, the bastard dieth without issue, and the lord by escheat doth enter, and after the ancestor dieth; this warranty shall not bind.

A collateral warranty may descend upon an issue in tail before the right descended, and yet be good, with this difference, that the right be in *esse* in some of the ancestors of the heir at the time of the descent of the warranty; as if tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail releaseth all his right, &c. to the disseisor with warranty, and dieth without issue, and the tenant in tail hath issue and dieth; in this case, the issue is barred. But otherwise it is where the right is not in *esse* in the heir, or any of his ancestors, at the time of the fall of the warranty; as if lord and tenant be, and the tenant make a feoffment in fee with warranty, and after the feoffee doth purchase the seignory, and after the tenant doth cease; in this case the lord shall have a cessavit; for a warranty doth never bar any right, that doth commence after the warranty (*n*).

Lit. sect.
7 H. Co. super
Lit. 388.

2. What shall
be said a lineal
warranty: and
how such a
warranty shall
bar.

If the case be so that if no such warranty had been made by the father or other ancestor, the right of the lands or tenements so warranted, had or might have descended or come from the same ancestor, and that from and by him that made the same warranty, such a warranty is a lineal warranty (*o*). As if a man be seised in fee of land, and make a feoffment of it to another, and bind him and his heirs to warrant the land, and hath issue and die, and the warranty doth descend upon the issue; this is a lineal warranty, for that, if none such had been, the right of the land had descended to him as heir to his father, and he must have made his descent by him. And if there be grandfather, father and son, and the grandfather be disseised, and the father release to the disseisor being in possession with warranty, &c. and dieth, and after the grandfather dieth; this is a lineal warranty to the son, and albeit in this case the warranty descend * before the right, yet it is a good bar. And if there be two brothers, and the father is disseised, and the eldest brother doth release with warranty, and die without issue, and after the father dieth, and the warranty doth descend to the younger son; this is a lineal warranty to him. And if lands be given to *A.* for life, the remainder to his right heirs, and he doth make a feoffment with warranty and die; this is but a lineal warranty (*p*). And if two parceners be, and the

Lit. sect. 703.
711.

Co. super Lit.
371.

* P. 191.

Lit. sect. 707.

Co. 1. 66. 67.

(*m*) Warranty by a tenant in dower must be considered as a warranty by a tenant for life, and consequently void by virtue of the above noticed act of *Ann*.

(*n*) See accordingly in 1 Wood, 335 to 338, and further what shall be said a good warranty in deed, and who shall be bound by it, in Com. Dig. Garranty, (B). Vin. Abr. Voucher, (B. 2). Bac. Abr. Warranty, (D).

(*o*) See *supra*, page 181, note (f), on the subject of lineal warranty.

(*p*) In a case like this the warranty is not entered into by a mere tenant for life and therefore void under the statute of *Ann*, but it is entered into by a person seised *in fee*; for the remainder to *A.*'s right heirs, uniting with his life estate, brings the case within the rule in *Shelley's case*, (2 Rep. 189), and gives *A.* a fee-simple.

eldest

Co. 8. 52. New
terms of the
law, tit. War-
ranty.

Lit. sect. 719.

Lit. sect. 714.

Co. super Lit.
375.

Lit. sect. 718.

Lit. sect. 711.
712. Doct. &
Stud. 152. 153.
Co. 8. 52.

eldest enter into all the land to her own use, and then doth make a feoffment with warranty and dieth without issue; this as to her own part is a lineal warranty, but as to her sister's part is a collateral warranty (g). And in every case where one doth demand an estate tail, if any ancestor of the issue in tail, whether he had possession of the land or not, hath made a warranty, and if the issue, that were to bring a writ of formedon, may or might have, by possibility of some matter that might have been done, conveyed to himself a title by force of the gift by him that made the warranty; this is a lineal warranty. As if a man be seised of land of an estate tail to him and the heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and hath issue and dieth; this warranty descending upon the issue is a lineal warranty. And if lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the donee doth make a feoffment with warranty, and hath issue a son and a daughter and dieth; this warranty is lineal to the son, and if the son die without issue male, it is a lineal warranty from the father to the daughter. But if the brother in his life-time release to the discontinuee, &c. with warranty, &c. and after dieth without issue; this is a collateral warranty to the daughter. If lands be given to the husband and wife, and the heirs of their two bodies engendered, and they have issue, and the husband discontinue and die, and after the wife doth release with warranty and die; this is a lineal warranty. And if lands be given to a man and a woman unmarried, and the heirs of their two bodies, and they intermarry, and are disseised, and the husband doth release with warranty, and dieth, and after the wife dieth; this is a lineal warranty to the issue for all the land. And if tenant in tail have issue three sons and discontinue, and the middle brother doth release with warranty, and die without issue, and after the father dieth, and after the elder brother dieth without issue, so that the warranty doth descend to the younger brother; this is a lineal warranty to him. And if a father give land to his eldest son and the heirs males of his body, &c. the remainder to the second son, &c. if the eldest son alien in fee with warranty, &c. and hath issue female, and dieth without issue male; this is a lineal warranty * to the second son (r). And in all these cases of a lineal warranty, if the right of the estate to be barred be the right of an estate in fee-simple, it is a bar without any assets; for the rule is, that as to him that demandeth fee-simple by any of his ancestors, he shall be barred and bound by a lineal warranty that doth descend upon him, unless he be restrained by some statute. But it doth not bind the right of an estate in fee-tail without assets, for

* P. 192.

(g) If she entered into her sister's part, claiming the whole, and denying her sister's right, (See *supra*, p. 14, note (v).) would it not, as to the sister's part, rather be a warranty commencing by disseisin? and see *infra*, page 191, text.

(r) *Quere* of this—as the right to the estate does not come from or through the person who made the warranty, nor does the obligation of the warranty devolve upon the same person who is entitled to the estate; and see too next page, where a contrary doctrine is laid down.

in that case the rule is, that as to him that demandeth fee-tail by writ of formedon in the descender, he shall not be barred by a lineal warranty, unless he hath assets by descent in fee-simple of other land from the same ancestor that made warranty; and then it is a bar for so much only as doth descend to him and no more. And yet if the issue in tail do alien the assets descended and die; in this case the issue of that issue is not barred by this warranty and assets. But if the issue to whom the warranty doth descend, bring his writ of formedon, and is barred by judgment by reason of the warranty and assets; in this case albeit he alien the assets afterwards, yet the estate tail is barred for ever.

Co. super Lit.
393.

9. What shall be said a collateral warranty: and how such a warranty shall bar.

If tenant for life do alien in fee with warranty, or be disseised and release to the disseisor with warranty and die, and the warranty descend on him in reversion or remainder; this is a collateral warranty (e). So if the lessee for life be disseised, and a collateral ancestor of him in reversion, release with warranty and die, and the warranty descend on him in reversion; this is a collateral warranty, for that is collateral which is collateral to the title of the land. And if a man seised of lands in fee have issue two sons, and the father dieth, and the younger son doth enter, and doth alien the land with warranty, and die without issue; this is now a collateral warranty that is descended on the elder brother (f). And if a son be disseised of his own land, and bring an assise, and after the father doth release to the disseisor with warranty and dieth; this warranty that doth descend to the son is a collateral warranty (u). And if a father disseise his son of the land he hath of his own purchase, without any intent to alien afterwards and to bar his son, and afterwards he doth make a feoffment with warranty and die before the entry of his son, so that the warranty doth descend; this is a collateral warranty (x). If there be father and two sons, and the father is disseised, and the younger son doth release with warranty to the disseisor, and die without issue, and then the father dieth; in this case, the warranty now descended is a collateral warranty. If a lease be made for life to the father, the remainder to his next heir, and the father is disseised, and doth release with warranty and dieth; this is a collateral warranty to the heir. And if the husband discontinue * the right of his wife, and ancestor collateral to the wife to whom she is her heir doth release with warranty and die, and after the husband dieth; this is a collateral warranty and a bar to her (y). And in every case where a man doth demand an estate tail by a writ of formedon, if any ancestor of the issue in tail, which hath, or hath not possession, maketh a warranty, and the

Co. 1. 67.
21 H. 7. 10.
Lit. sect. 744.

Lit. sect. 707.
Doct. & Studt.
152.

21 H. 7. 10.

Lit. sect. 704.

Lit. sect. 707.

Co. super Lit.
388.

Co. 10. 96.
Lit. sect. 709.
Plow. 234.
Kelw. 78.

* P. 193.

(e) Warranty by a tenant for life is void by the above noticed act of the 4 Anne, c. 16. s. 21.

(f) *Quere* if the warranty in this case must not be considered as a warranty commencing by disseisin?

(u) See supra, page 181, note (f), for a definition of a collateral warranty.

(x) *Quere* if not rather a warranty commencing by disseisin; and see supra, page 181, note (g), respecting disseisin without an intent to make a subsequent alienation with warranty.

(y) Not a bar since the act of 4 Ann. c. 16, as this act declares, that collateral warranties by any ancestor not seised of an estate of inheritance in possession shall be void.

issue that is demandant cannot by any possibility that may be done, convey to him a title by force of the gift from and by him that made the warranty; this is a collateral warranty: as if tenant in tail discontinue the tail and die, having issue, and the uncle of the issue doth release with warranty to the discontinuee, and die without issue, so that the warranty doth descend on the issue in tail; this is a collateral warranty (a). So if such a discontinuee make a feoffment in fee, or be disseised, and the uncle release with warranty to the disseisor, or feoffee, and die without issue, and the warranty doth descend on the issue; this is a collateral warranty. If a tenant in tail have three sons, and discontinue the tail in fee, and the middle brother doth release to the discontinuee with warranty, and after the tenant in tail dieth; this is a collateral warranty to the elder brother (b). If one have issue three sons, and giveth land to the eldest, and the heirs of his body, and for want of such issue to the middle, and the heirs of his body, the remainder to the third, and the heirs of his body, and the eldest doth discontinue the tail in fee with warranty, and die without issue; this is collateral to the middle son. In the same manner it is in case where the middle son hath the same land by force of the same remainder, because his elder brother made no discontinuance, but died without issue of his body, and after the middle brother doth make a discontinuance with warranty, &c. and dieth without issue; this is a collateral warranty to the youngest son (c). And in this case if any of the sons be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right with warranty; this is a collateral warranty to that son upon whom the warranty doth descend (d). If lands be given to A. and the heirs of his body, and for want of such issue to E. his sister, and the heirs of her body, and A. doth make a feoffment with warranty, and die without issue, having two sisters, E. and S.; this is a collateral warranty to E. If lands be given to a man and the heirs of his body begotten, who taketh a wife, and hath issue a son by her, and the husband doth discontinue the tail in fee and dieth, and after the wife doth release to the discontinuee with warranty, and dieth, and the warranty doth descend to the son; this is collateral to him. If tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail doth release to the disseisor with warranty in fee, and dieth without issue, and the tenant in tail hath issue and dieth; this is collateral as to the issue. If tenant in tail have issue two daughters, and die, and the elder enter into all to her own use, and thereof

* P. 194.

(a) But does not bar the issue, see last note.

(b) See last note but one, as also applicable to the two cases last put.

(c) In the two cases last put, the warranty is made by a person seized of an estate of inheritance in possession, and therefore the warranty is a bar; and the case does not fall within the above noticed act of Anne.

(d) Here the warranty, which is collateral, is made by a person who is not seized of an estate of inheritance in possession, and is consequently void under the act of Anne. The student will bear in mind in all future cases which may occur of collateral warranties made by persons not seized of an estate of inheritance in possession, that such warranties are void by the act of Anne.

make

make a feoffment in fee with warranty, and die without issue, this warranty as to the other sister's part is collateral (e), but not as to her own. If the husband and wife, tenants in special tail, have issue a daughter, and the wife die, and the husband by a second wife have issue another daughter, and discontinueth in fee and dieth, and a collateral ancestor of the daughter's release to the discontinuee with warranty and dieth, and the warranty descend upon both the daughters, this is a collateral warranty to them (f). If lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the father die, and the brother release with warranty, and die without issue; this is collateral to the daughter. If tenant in tail make a lease for life, the remainder to another in fee, and a collateral ancestor doth confirm the estate of tenant for life with warranty and die, and after the tenant in tail die, having issue; this is a good binding collateral warranty during the estate for life (g). And in all these and such like cases of a collateral warranty, whether the right be the right of an estate tail, or the right of an estate in fee simple that is to be barred, it is a bar without any assets; for in this case the rule is, that a collateral warranty is a bar to him that demandeth fee simple, and also to him that demandeth fee tail, without any other descent of lands in fee simple; so that the heir on whom the same warranty is descended, can never have the land so warranted, whilst the warranty doth continue in force, but is bound thereby, except it be in some special cases restrained by act of parliament; as where the husband alone during his wife's life, or after her death, being tenant by the curtesy, make a feoffment by fine, or deed, of his wife's land, which she hath by descent or purchase, with warranty; this will not bar her heir without assets of other lands in fee simple descended from the same ancestor that made the warranty (h). Or where a wife after her husband's death, shall alone, or with her succeeding husband alien, release, confirm, or discontinue with warranty, the land she holdeth in dower, or in tail, or the gift of her former husband, or any of his ancestors; this warranty is voidable, and will not bind with assets (i).

Co. super Lit.
373.

Lit. sect. 758.

Lit. sect. 712.
Co. super Lit.
374. Co. 10.
96. Stat. of
Glouc. ch. 3.
Co. super Lit.
365. Stat. 11
H. 7. ch. 20.

10. What shall be said a warranty that doth begin by disseisin: and what such a warranty doth work.

If the son purchase land, &c. and after let it to his father, or any other ancestor for years, or at will, and he by his deed doth infeoff a stranger, and that with warranty, and after dieth, whereby the warranty doth descend upon the heir; this warranty doth commence by disseisin (k). So if tenant by elegit, statute-merchant, guardian in chivalry, or

Lit. sect. 699.
700, 701, 702.
Finch, 82.
Co. super Lit.
367.

(e) *Quære*, if not commencing by disseisin? See *supra*, page 191, note (q), and see also next page.

(f) And void by the act of *Anne*.

(g) Not since the above noticed act of *Anne*.

(h) See the act of 32 *Hen.* 8. c. 28. s. 6. which restrains husbands from discontinuing estates of which they are seised *jure uxoris*.

(i) See *supra*, page 27, note (q), on the act of the 11 *Hen.* 7. c. 20. restraining alienation by wives seised in tail *jure mariti*.

(k) See *supra*, page 181, note (f), as to warranty by disseisin.

socage,

socage, or because of * nurture, make a feoffment with warranty, and this warranty doth descend on his heir; this warranty doth commence by disseisin. So if one that hath no right at all enter into my land, and make a feoffment to another with warranty. So if one coparcener enter into the whole land, and make a feoffment in fee with warranty; this warranty as to the one moiety doth begin by disseisin. So if father and son purchase lands to them jointly, &c. and the father alien the whole to another with warranty, &c. and after the father dieth; this warranty as to the one moiety doth begin by disseisin. But if the purchase be to them two and the heirs of the son it is otherwise, for if the son enter in the life-time of the father, the warranty is avowed for all, but if he do not enter, then as to the father's moiety it is a collateral warranty. And if the purchase be to the father and son, and the heirs of the father, and the father alien with warranty, &c. in this case the warranty is good for the whole.

Co. 5. 80.
super Lit. 366,
367.

If the father be tenant for life, the remainder to his son and heir in fee, and the father by covin and consent, of purpose to bar the heir by a collateral warranty, maketh a lease for years, to the end that the lessee should make a feoffment in fee, that the father may release to the feoffee with warranty, and all this is done accordingly, and the father dieth, and the warranty doth descend to the son; in this case, the warranty shall be said to begin by disseisin. But if the father in this case make a feoffment in fee with warranty and die; this is a good warranty to bind the son, albeit it is done of purpose to bar him (1). So if one brother make a gift in tail to another, and the uncle doth disseise the donee, and infeoffeth another with warranty, the uncle dieth, and the warranty descendeth on the donor, and then the donee dieth without issue; this warranty doth begin by disseisin. So if the father and son and a third person be joint-tenants in fee, and the father maketh a feoffment in fee of the whole, with warranty, and dieth, and then the son dieth; in this case, as to the part of the third person and to the part of the son, the warranty shall be said to begin by disseisin. But releases at this day by a tenant for life, to a disseisor, or any other, without covin, albeit it be to the intent to bar him in reversion, shall bar him (m); for intent, without covin and disseisin, shall not avoid a warranty: and examples of warranties that do begin by disseisin, have these qualities: 1. That for the most part the disseisin is done immediately to the heir that is bound by the warranty. 2. The warranty and disseisin are *simul* and *semel*. And yet if a man disseise another with intent to make a feoffment with warranty, albeit the feoffment be made twenty years after the disseisin, yet it shall be said to be a warranty that doth begin by disseisin. But in all these cases of warranties that do begin by disseisin, this is the rule, that * they are

* P. 196.

(1) Not good since the above noticed act of the 4 Anne, c. 16. s. 21. which makes void all warranties by tenants for life.

(m) Warranty by tenant for life now void by the above noticed act of Anne.

A warranty made for life, or in tail, is good, and shall bind for so long only; as if tenant in tail of land let it for life, the remainder to another in fee, and a collateral ancestor doth confirm the estate of the tenant for life, and die, and the tenant in tail hath issue; this is a bar to the issue during the life of the tenant for life. And in this case upon a voucher the recovery in value shall be put for life only. Lit. sect. 73a.
Co. super Lit.
387.

If one make a gift in tail, and grant to warrant the land given according to the gift; this warranty is good no longer than the estate doth last. And no warranty that a donor can make, in this case, can bar him of the land, if the donee die without issue, and the estate determine. Co. 10. 96.

And where a warranty doth bar, it is entire, and doth extend to all the land, and to all persons, upon whom it doth descend, and is a bar of all the right that every one of them hath in the land; so that if they have all right jointly or severally, or one only hath all the right and the rest none, he that hath the right is barred. And therefore if lands be given to *A.* and the heirs of his body, and for want of such issue to *E.* his sister and the heirs of her body, and *A.* doth make a feoffment with warranty, and die without issue, having two sisters *E.* and *S.* this is a bar to *E.* for the whole, albeit the warranty descend on her and another (*e*). Co. 8. 52.
super Lit. 373.

** P. 189.* If there be tenant for life, the remainder to his son and heir apparent in tail, and the father doth make a feoffment in fee with ** warranty* and dieth; in this case this is a good warranty, and will bar the son, albeit it be made of purpose to bar him (*f*). But if by agreement and covin between him and *A.* and *B.* he make a lease to *A.* who makes a feoffment in fee to *B.* to whom the father doth release with warranty, thinking by a collateral warranty to bar his son; this is no bar, for this warranty began by disseisin: and if in the first case the son doth enter in the life-time of the father upon the land, he doth avoid the warranty. Co. 5. 79.

If the father be tenant for life, the remainder to the next heir male of the father, and to the heirs males of the body of such next heir male, and the father makes a feoffment to *I. S.* with warranty and dieth; it seems this warranty is a good bar to the heir (*g*); and in this case the heir cannot enter in the life-time of his father, for he cannot be heir male unto his father until his father's death. Co. 1. 66.

If tenant for life make a feoffment with warranty, or be disseised, and release with warranty, and he in reversion, Co. super Lit.
366. 365. Co.

(*e*) The above is a case of collateral warranty, which falls within the act of the 4 Ann. c. 16. s. 21. It will be recollected, however, that this act does not render inoperative *all* collateral warranties, but only such as are entered into by persons who have not an estate of inheritance in possession.

(*f*) This also is the case of a collateral warranty, which comes within the act of *Ann.*

(*g*) This case appears to be precisely the same with the one noticed in note (*d*), page 184, and it is apprehended it is clearly a case of collateral warranty, the warranty being entered into by a person with a mere life estate.

2. 67. Stat.
Glouc. ch. 6.
Lit. sect. 724.
725.

being heir to the tenant for life, doth not enter, but suffer the lessee for life to die, and thereby the warranty to fall and descend upon him; in this case, this warranty generally is a bar without any assets (*h*). But if he that doth so alien, &c. be tenant by the curtesy, this is no bar to the heir, without assets in fee-simple from the tenant by the curtesy, and then it is a bar for so much (*i*). And if the heir, for want of this assets at the time, doth recover the land from his mother, and after assets doth descend from the father; in this case the tenant shall recover the same land from the mother again. And if she that doth so alien, &c. be tenant for life of the inheritance or purchase of her deceased husband, or given unto her by any of the ancestors of her husband, or by any other person seised to the use of her husband, or of any of his ancestors; in this case, her alienation, release, or confirmation with warranty, shall not bind the heir whether he have assets or not. But if a man convey lands to the use of himself, *B.* his wife, and the heirs of his body, and they have issue *C.* and the father dieth, and *C.* disseiseth his mother, or getteth a feoffment from a disseisor, and then suffereth a recovery with a single voucher, and after the mother doth release to the recoveror with warranty; in this case the warranty is a bar to the issue, and not void by the statute of *H. 7.* (*k*).

Stat. 11 H. 7.
chap. 20. Lit.
sect. 727. Co.
super Lit. 365.

Co. 3. 58.

Co. super Lit.
366. 381. Stat.
Glouc. ch. 6.
Lit. sect. 334.

If the husband that is seised of lands in the right of his wife levy a fine, or maketh a feoffment in fee with warranty, and the wife dieth, and then the husband dieth; this warranty shall not bind the heir of the wife without assets of other land in fee-simple from the father, albeit he be not tenant by the curtesy, but it is before her death that he doth make the estate and the warranty (*l*). But a fine levied by the husband and wife, in this case, is a good bar to the heir.

Fine.

Co. 3. 62.
27 Ass. pl. 37.
29 Ass. pl. 34.

If tenant in tail that is in of another estate, *i. e.* either by disseisin, or by the feoffment of a disseisor, doth suffer a common recovery, and a collateral ancestor of the tenant in tail doth release with warranty to the recoveror, and after the recoveror doth make a feoffment to uses executed by the statute of 27 *H. 8.* and after the collateral ancestor dieth; in this case albeit the estate of the land be transferred in the post before the descent of the warranty, yet it shall bind. So if he to whom the warranty is made suffer a common recovery, and after the ancestor dieth. But if tenant in dower enfeoff a villain with warranty, and the lord of the villain enter into the land before the descent of the warranty, and after the woman dieth;

P. 190.

(A) Is not a bar since the above noticed act of *Ann.*

(i) Warranty by tenant by the curtesy, being a warranty by a mere tenant for life, is now void by the above act of the 4 *Ann.*

(k) See this act more fully noticed, *supra*, page 27, note (q).

(l) A warranty by a husband, seised *jure uxoris*, is a warranty by a person who is not seised of an estate of inheritance, and consequently, although the wife's heir, upon whom the estate descends, may also be the husband's heir, yet the warranty being collateral to the estate and not being entered into by a person seised of an estate of inheritance, it will, since the above noticed act of *Ann.*, be no bar either with or without assets. See the act of 32 *Hen. 8.* c. 28. s. 6. as to discontinuance by husbands seised *jure uxoris*.

this warranty shall not bind the right of the heir (*m*). So if a collateral warranty be made to a bastard and his heirs, and living the ancestor, the bastard dieth without issue, and the lord by escheat doth enter, and after the ancestor dieth; this warranty shall not bind.

A collateral warranty may descend upon an issue in tail before the right descended, and yet be good, with this difference, that the right be in *esse* in some of the ancestors of the heir at the time of the descent of the warranty; as if tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail releaseth all his right, &c. to the disseisor with warranty, and dieth without issue, and the tenant in tail hath issue and dieth; in this case, the issue is barred. But otherwise it is where the right is not in *esse* in the heir, or any of his ancestors, at the time of the fall of the warranty; as if lord and tenant be, and the tenant make a feoffment in fee with warranty, and after the feoffee doth purchase the seignior, and after the tenant doth cease; in this case the lord shall have a cessavit; for a warranty doth never bar any right, that doth commence after the warranty (*n*).

Lit. sect.
7 H. Co. super
Lit. 388.

S. What shall be said a lineal warranty: and how such a warranty shall bar.

If the case be so that if no such warranty had been made by the father or other ancestor, the right of the lands or tenements so warranted, had or might have descended or come from the same ancestor, and that from and by him that made the same warranty, such a warranty is a lineal warranty (*o*). As if a man be seised in fee of land, and make a feoffment of it to another, and bind him and his heirs to warrant the land, and hath issue and die, and the warranty doth descend upon the issue; this is a lineal warranty, for that, if none such had been, the right of the land had descended to him as heir to his father, and he must have made his descent by him. And if there be grandfather, father and son, and the grandfather be disseised, and the father release to the disseisor being in possession with warranty, &c. and dieth, and after the grandfather dieth; this is a lineal warranty to the son, and albeit in this case the warranty descend * before the right, yet it is a good bar. And if there be two brothers, and the father is disseised, and the eldest brother doth release with warranty, and die without issue, and after the father dieth, and the warranty doth descend to the younger son; this is a lineal warranty to him. And if lands be given to *A.* for life, the remainder to his right heirs, and he doth make a feoffment with warranty and die; this is but a lineal warranty (*p*). And if two parceners be, and the

Lit. sect. 703.
711.

Co. super Lit.
371.

* P. 191.

Lit. sect. 707.

Co. 1. 66. §.

(*m*) Warranty by a tenant in dower must be considered as a warranty by a tenant for life, and consequently void by virtue of the above noticed act of *Ann*.

(*n*) See accordingly in 1 Wood, 335 to 338, and further what shall be said a good warranty in deed, and who shall be bound by it, in Com. Dig. Warranty, (B). Vin. Abr. Voucher, (B. 2). Bac. Abr. Warranty, (D).

(*o*) See supra, page 181, note (f), on the subject of lineal warranty.

(*p*) In a case like this the warranty is not entered into by a mere tenant for life and therefore void under the statute of *Ann*, but it is entered into by a person seised *in fee*; for the remainder to *A.*'s right heirs, uniting with his life estate, brings the case within the rule in *Shelley's case*, (2 Rep. 189), and gives *A.* a fee-simple.

eldest

eldest enter into all the land to her own use, and then doth make a feoffment with warranty and dieth without issue; this as to her own part is a lineal warranty, but as to her sister's part is a collateral warranty (q). And in every case where one doth demand an estate tail, if any ancestor of the issue in tail, whether he had possession of land or not, hath made a warranty, and if the issue, were to bring a writ of formedon, may or might have, possibility of some matter that might have been done, conveyed to himself a title by force of the gift by him that made the warranty; this is a lineal warranty. As if a man be seised of land of an estate tail to him and the heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and hath issue and dieth; this warranty descending upon the issue is a lineal warranty. And if lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the donee doth make a feoffment with warranty, and hath issue a son and a daughter and dieth; this warranty is lineal to the son, and if the son die without issue male, it is a lineal warranty from the father to the daughter. But if the brother in his life-time release to the discontinuee, &c. with warranty, &c. and after dieth without issue; this is a collateral warranty to the daughter. If lands be given to the husband and wife, and the heirs of their two bodies engendered, and they have issue, and the husband discontinue and die, and after the wife doth release with warranty and die; this is a lineal warranty. And if lands be given to a man and a woman unmarried, and the heirs of their two bodies, and they intermarry, and are disseised, and the husband doth release with warranty, and dieth, and after the wife dieth; this is a lineal warranty to the issue for all the land. And if tenant in tail have issue three sons and discontinue, and the middle brother doth release with warranty, and die without issue, and after the father dieth, and after the elder brother dieth without issue, so that the warranty doth descend to the younger brother; this is a lineal warranty to him. And if a father give land to his eldest son and the heirs males of his body, &c. the remainder to the second son, &c. if the eldest son alien in fee with warranty, &c. and hath issue female, and dieth without issue male; this is a lineal warranty * to the second son (r). And in all these cases of a lineal warranty, if the right of the estate to be barred be the right of an estate in fee-simple, it is a bar without any assets; for the rule is, that as to him that demandeth fee-simple by any of his ancestors, he shall be barred and bound by a lineal warranty that doth descend upon him, unless he be restrained by some statute. But it doth not bind the right of an estate in fee-tail without assets, for

Lit. sect. 719.

Lit. sect. 714.

Co. super Lit. 375.

Lit. sect. 718.

Lit. sect. 711.
712. Doct. &
Stat. 152. 153.
Co. 8. 52.

* P. 192.

(q) If she entered into her sister's part, claiming the whole, and denying her sister's right, (See *supra*, p. 14, note (v).) would it not, as to the sister's part, rather be a warranty commencing by disseisin? and see *infra*, page 191, text.

(r) *Quere* of this—as the right to the estate does not come from or through the person who made the warranty, nor does the obligation of the warranty devolve upon the same person who is entitled to the estate; and see too next page, where a contrary doctrine is laid down.

this warranty shall not bind the right of the heir (*m*). So if a collateral warranty be made to a bastard and his heirs, and living the ancestor, the bastard dieth without issue, and the lord by escheat doth enter, and after the ancestor dieth; this warranty shall not bind.

A collateral warranty may descend upon an issue in tail before the right descended, and yet be good, with this difference, that the right be in *esse* in some of the ancestors of the heir at the time of the descent of the warranty; as if tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail releaseth all his right, &c. to the disseisor with warranty, and dieth without issue, and the tenant in tail hath issue and dieth; in this case, the issue is barred. But otherwise it is where the right is not in *esse* in the heir, or any of his ancestors, at the time of the fall of the warranty; as if lord and tenant be, and the tenant make a feoffment in fee with warranty, and after the feoffee doth purchase the seignior, and after the tenant doth cease; in this case the lord shall have a cessavit; for a warranty doth never bar any right, that doth commence after the warranty (*n*).

Lit. sect.
7 H. Co. super
Lit. 388.

a. What shall be said a lineal warranty: and how such a warranty shall bar.

If the case be so that if no such warranty had been made by the father or other ancestor, the right of the lands or tenements so warranted, had or might have descended or come from the same ancestor, and that from and by him that made the same warranty, such a warranty is a lineal warranty (*o*). As if a man be seised in fee of land, and make a feoffment of it to another, and bind him and his heirs to warrant the land, and hath issue and die, and the warranty doth descend upon the issue; this is a lineal warranty, for that, if none such had been, the right of the land had descended to him as heir to his father, and he must have made his descent by him. And if there be grandfather, father and son, and the grandfather be disseised, and the father release to the disseisor being in possession with warranty, &c. and dieth, and after the grandfather dieth; this is a lineal warranty to the son, and albeit in this case the warranty descend* before the right, yet it is a good bar. And if there be two brothers, and the father is disseised, and the eldest brother doth release with warranty, and die without issue, and after the father dieth, and the warranty doth descend to the younger son; this is a lineal warranty to him. And if lands be given to *A.* for life, the remainder to his right heirs, and he doth make a feoffment with warranty and die; this is but a lineal warranty (*p*). And if two parceners be, and the

Lit. sect. 703.
711.

Co. super Lit.
371.

* P. 191.

Lit. sect. 707.

Co. 1. 66. 67.

(*m*) Warranty by a tenant in dower must be considered as a warranty by a tenant for life, and consequently void by virtue of the above noticed act of *Anne*.

(*n*) See accordingly in 1 Wood, 335 to 338, and further what shall be said a good warranty in deed, and who shall be bound by it, in Com. Dig. Garranty, (B). Vin. Abr. Voucher, (B. 2). Bac. Abr. Warranty, (D).

(*o*) See supra, page 181, note (f), on the subject of lineal warranty.

(*p*) In a case like this the warranty is not entered into by a mere tenant for life and therefore void under the statute of *Ann*, but it is entered into by a person seised *in fee*; for the remainder to *A.*'s right heirs, uniting with his life estate, brings the case within the rule in *Shelley's case*, (2 Rep. 189), and gives *A.* a fee-simple.

Co. 8. 52. New
terms of the
law, tit. War-
ranty.

Lit. sect. 719.

Lit. sect. 714.

Co. super Lit.
573.

Lit. sect. 718.

Lit. sect. 711.
712. Doct. &
Stud. 152. 153.
Co. 8. 52.

eldest enter into all the land to her own use, and then doth make a feoffment with warranty and dieth without issue; this as to her own part is a lineal warranty, but as to her sister's part is a collateral warranty (q). And in every case where one doth demand an estate tail, if any ancestor of the issue in tail, whether he had possession of the land or not, hath made a warranty, and if the issue, that were to bring a writ of formedon, may or might have, by possibility of some matter that might have been done, conveyed to himself a title by force of the gift by him that made the warranty; this is a lineal warranty. As if a man be seised of land of an estate tail to him and the heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and hath issue and dieth; this warranty descending upon the issue is a lineal warranty. And if lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the donee doth make a feoffment with warranty, and hath issue a son and a daughter and dieth; this warranty is lineal to the son, and if the son die without issue male, it is a lineal warranty from the father to the daughter. But if the brother in his life-time release to the discontinuee, &c. with warranty, &c. and after dieth without issue; this is a collateral warranty to the daughter. If lands be given to the husband and wife, and the heirs of their two bodies engendered, and they have issue, and the husband discontinue and die, and after the wife doth release with warranty and die; this is a lineal warranty. And if lands be given to a man and a woman unmarried, and the heirs of their two bodies, and they intermarry, and are disseised, and the husband doth release with warranty, and dieth, and after the wife dieth; this is a lineal warranty to the issue for all the land. And if tenant in tail have issue three sons and discontinue, and the middle brother doth release with warranty, and die without issue, and after the father dieth, and after the elder brother dieth without issue, so that the warranty doth descend to the younger brother; this is a lineal warranty to him. And if a father give land to his eldest son and the heirs males of his body, &c. the remainder to the second son, &c. if the eldest son alien in fee with warranty, &c. and hath issue female, and dieth without issue male; this is a lineal warranty * to the second son (r). And in all these cases of a lineal warranty, if the right of the estate to be barred be the right of an estate in fee-simple, it is a bar without any assets; for the rule is, that as to him that demandeth fee-simple by any of his ancestors, he shall be barred and bound by a lineal warranty that doth descend upon him, unless he be restrained by some statute. But it doth not bind the right of an estate in fee-tail without assets, for

* P. 192.

(q) If she entered into her sister's part, claiming the whole, and denying her sister's right, (See *supra*, p. 14, note (v).) would it not, as to the sister's part, rather be a warranty commencing by disseisin? and see *infra*, page 191, text.

(r) *Quare* of this—as the right to the estate does not come from or through the person who made the warranty, nor does the obligation of the warranty devolve upon the same person who is entitled to the estate; and see too next page, where a contrary doctrine is laid down.

in that case the rule is, that as to him that demandeth fee-tail by writ of formedon in the descender, he shall not be barred by a lineal warranty, unless he hath assets by descent in fee-simple of other land from the same ancestor that made warranty; and then it is a bar for so much only as doth descend to him and no more. And yet if the issue in tail do alien the assets descended and die; in this case the issue of that issue is not barred by this warranty and assets. But if the issue to whom the warranty doth descend, bring his writ of formedon, and is barred by judgment by reason of the warranty and assets; in this case albeit he alien the assets afterwards, yet the estate tail is barred for ever.

Co. super Lit.
393.

9. What shall be said a collateral warranty: and how such a warranty shall bar.

If tenant for life do alien in fee with warranty, or be disseised and release to the disseisor with warranty and die, and the warranty descend on him in reversion or remainder; this is a collateral warranty (s). So if the lessee for life be disseised, and a collateral ancestor of him in reversion, release with warranty and die, and the warranty descend on him in reversion; this is a collateral warranty, for that is collateral which is collateral to the title of the land. And if a man seised of lands in fee have issue two sons, and the father dieth, and the younger son doth enter, and doth alien the land with warranty, and die without issue; this is now a collateral warranty that is descended on the elder brother (t). And if a son be disseised of his own land, and bring an assise, and after the father doth release to the disseisor with warranty and dieth; this warranty that doth descend to the son is a collateral warranty (u). And if a father disseise his son of the land he hath of his own purchase, without any intent to alien afterwards and to bar his son, and afterwards he doth make a feoffment with warranty and die before the entry of his son, so that the warranty doth descend; this is a collateral warranty (x). If there be father and two sons, and the father is disseised, and the younger son doth release with warranty to the disseisor, and die without issue, and then the father dieth; in this case, the warranty now descended is a collateral warranty. If a lease be made for life to the father, the remainder to his next heir, and the father is disseised, and doth release with warranty and dieth; this is a collateral warranty to the heir. And if the husband discontinue * the right of his wife, and ancestor collateral to the wife to whom she is her heir doth release with warranty and die, and after the husband dieth; this is a collateral warranty and a bar to her (y). And in every case where a man doth demand an estate tail by a writ of formedon, if any ancestor of the issue in tail, which hath, or hath not possession, maketh a warranty, and the

Co. 1. 67.
21 H. 7. 10.
Lit. sect. 796.

Lit. sect. 707.
Doct. & Sedit.
152.

21 H. 7. 10.

Lit. sect. 704.

Lit. sect. 707.

Co. super Lit.
388.

Co. 10. 96.
Lit. sect. 709.
Plow. 234.
Kelw. 78.

* P. 193.

- (s) Warranty by a tenant for life is void by the above noticed act of the 4 Annæ, c. 16. s. 21.
(t) *Quære* if the warranty in this case must not be considered as a warranty commencing by disseisin?
(u) See *supra*, page 181, note (f), for a definition of a collateral warranty.
(x) *Quære* if not rather a warranty commencing by disseisin; and see *supra*, page 181, note (g), respecting disseisin without an intent to make a subsequent alienation with warranty.
(y) Not a bar since the act of 4 Annæ c. 16, as this act declares, that collateral warranties by any ancestor not seised of an estate of inheritance in possession shall be void.

issue

issue that is demandant cannot by any possibility that may be done, convey to him a title by force of the gift from and by him that made the warranty; this is a collateral warranty: as if tenant in tail discontinue the tail and die, having issue, and the uncle of the issue doth release with warranty to the discontinuee, and die without issue, so that the warranty doth descend on the issue in tail; this is a collateral warranty (a). So if such a discontinuee make a feoffment in fee, or be disseised, and the uncle release with warranty to the disseisor, or feoffee, and die without issue, and the warranty doth descend on the issue; this is a collateral warranty. If a tenant in tail have three sons,

Lit. sect. 708.

and discontinue the tail in fee, and the middle brother doth release to the discontinuee with warranty, and after the tenant in tail dieth; this is a collateral warranty to the elder brother (b). If one have issue three sons, and

Lit. sect. 716.

giveth land to the eldest, and the heirs of his body, and for want of such issue to the middle, and the heirs of his body, the remainder to the third, and the heirs of his body, and the eldest doth discontinue the tail in fee with warranty, and die without issue; this is collateral to the middle son. In the same manner it is in case where the middle son hath the same land by force of the same remainder, because his elder brother made no discontinuance, but died without issue of his body, and after the middle brother doth make a discontinuance with warranty, &c. and dieth without issue; this is a collateral warranty to the youngest son (c). And in this case if any of the sons be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right with warranty; this is a collateral warranty to that son upon whom the warranty doth descend (d). If lands be given to A. and the heirs of

Co. 8. 54.

Lit. sect. 713.

his body, and for want of such issue to E. his sister, and the heirs of her body, and A. doth make a feoffment with warranty, and die without issue, having two sisters, E. and S.; this is a collateral warranty to E. If lands be given to a man and the heirs of his body begotten, who taketh a wife, and hath issue a son by her, and the husband doth discontinue the tail in fee and dieth, and after the wife doth release to the discontinuee with warranty, and dieth, and the warranty doth descend to the son; this is collateral to him. If tenant in tail discontinue the tail in fee, and the discontinuee is disseised, and the brother of the tenant in tail doth release to the disseisor with warranty in fee, and dieth without issue, and the tenant in tail hath issue and dieth; this is collateral as to the issue. If tenant in tail have issue two daughters, and die, and the elder enter into all to her own use, and thereof

* P. 194.

(a) But does not bar the issue, see last note.

(b) See last note but one, as also applicable to the two cases last put.

(c) In the two cases last put, the warranty is made by a person seised of an estate of inheritance in possession, and therefore the warranty is a bar; and the case does not fall within the above noticed act of Anne.

(d) Here the warranty, which is collateral, is made by a person who is not seised of an estate of inheritance in possession, and is consequently void under the act of Anne. The student will bear in mind in all future cases which may occur of collateral warranties made by persons not seised of an estate of inheritance in possession, that such warranties are void by the act of Anne.

make

make a feoffment in fee with warranty, and die without issue, this warranty as to the other sister's part is collateral (e), but not as to her own. If the husband and wife, tenants in special tail, have issue a daughter, and the wife die, and the husband by a second wife have issue another daughter, and discontinueth in fee and dieth, and a collateral ancestor of the daughter's release to the discontinuance with warranty and dieth, and the warranty descend upon both the daughters, this is a collateral warranty to them (f). If lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the father die, and the brother release with warranty, and die without issue; this is collateral to the daughter. If tenant in tail make a lease for life, the remainder to another in fee, and a collateral ancestor doth confirm the estate of tenant for life with warranty and die, and after the tenant in tail die, having issue; this is a good binding collateral warranty during the estate for life (g). And in all these and such like cases of a collateral warranty, whether the right be the right of an estate tail, or the right of an estate in fee simple that is to be barred, it is a bar without any assets; for in this case the rule is, that a collateral warranty is a bar to him that demandeth fee simple, and also to him that demandeth fee tail, without any other descent of lands in fee simple; so that the heir on whom the same warranty is descended, can never have the land so warranted, whilst the warranty doth continue in force, but is bound thereby, except it be in some special cases restrained by act of parliament; as where the husband alone during his wife's life, or after her death, being tenant by the curtesy, make a feoffment by fine, or deed, of his wife's land, which she hath by descent or purchase, with warranty; this will not bar her heir without assets of other lands in fee simple descended from the same ancestor that made the warranty (h). Or where a wife after her husband's death, shall alone, or with her succeeding husband alien, release, confirm, or discontinue with warranty, the land she holdeth in dower, or in tail, of the gift of her former husband, or any of his ancestors; this warranty is voidable, and will not bind with assets (i).

Co. super Lit.
373.

Lit. sect. 758.

Lit. sect. 712.
Co. super Lit.
374. Co. 10.
96. Stat. of
Glouc. ch. 3.
Co. super Lit.
365. Stat. 11
H. 7. ch. 20.

10. What shall be said a warranty that doth begin by disseisin: and what such a warranty doth work.

If the son purchase land, &c. and after let it to his father, or any other ancestor for years, or at will, and he by his deed doth infeoff a stranger, and that with warranty, and after dieth, whereby the warranty doth descend upon the heir; this warranty doth commence by disseisin (k). So if tenant by elegit, statute-merchant, guardian in chivalry, or

Lit. sect. 699.
700, 701, 702.
Finch, 82.
Co. super Lit.
367.

(e) *Quare*, if not commencing by disseisin? See *supra*, page 191, note (q), and see also next page.

(f) And void by the act of *Anne*.

(g) Not since the above noticed act of *Anne*.

(h) See the act of 32 *Hen.* 8. c. 23. s. 6. which restrains husbands from discontinuing estates of which they are seized *jure uxoris*.

(i) See *supra*, page 27, note (q), on the act of the 11 *Hen.* 7. c. 20. restraining alienation by wives seized in tail *jure mariti*.

(k) See *supra*, page 181, note (f), as to warranty by disseisin.

socage,

socage, or because of * nurture, make a feoffment with warranty, and this warranty doth descend on his heir; this warranty doth commence by disseisin. So if one that hath no right at all enter into my land, and make a feoffment to another with warranty. So if one coparcener enter into the whole land, and make a feoffment in fee with warranty; this warranty as to the one moiety doth begin by disseisin. So if father and son purchase lands to them jointly, &c. and the father alien the whole to another with warranty, &c. and after the father dieth; this warranty as to the one moiety doth begin by disseisin. But if the purchase be to them two and the heirs of the son it is otherwise, for if the son enter in the life-time of the father, the warranty is avowed for all, but if he do not enter, then as to the father's moiety it is a collateral warranty. And if the purchase be to the father and son, and the heirs of the father, and the father alien with warranty, &c. in this case the warranty is good for the whole.

Co. 5. 80.
super Lit. 366,
367.

If the father be tenant for life, the remainder to his son and heir in fee, and the father by covin and consent, of purpose to bar the heir by a collateral warranty, maketh a lease for years, to the end that the lessee should make a feoffment in fee, that the father may release to the feoffee with warranty, and all this is done accordingly, and the father dieth, and the warranty doth descend to the son; in this case, the warranty shall be said to begin by disseisin. But if the father in this case make a feoffment in fee with warranty and die; this is a good warranty to bind the son, albeit it is done of purpose to bar him (l). So if one brother make a gift in tail to another, and the uncle doth disseise the donee, and infeoffeth another with warranty, the uncle dieth, and the warranty descendeth on the donor, and then the donee dieth without issue; this warranty doth begin by disseisin. So if the father and son and a third person be joint-tenants in fee, and the father maketh a feoffment in fee of the whole, with warranty, and dieth, and then the son dieth; in this case, as to the part of the third person and to the part of the son, the warranty shall be said to begin by disseisin. But releases at this day by a tenant for life, to a disseisor, or any other, without covin, albeit it be to the intent to bar him in reversion, shall bar him (m); for intent, without covin and disseisin, shall not avoid a warranty: and examples of warranties that do begin by disseisin, have these qualities: 1. That for the most part the disseisin is done immediately to the heir that is bound by the warranty. 2. The warranty and disseisin are *simul* and *semel*. And yet if a man disseise another with intent to make a feoffment with warranty, albeit the feoffment be made twenty years after the disseisin, yet it shall be said to be a warranty that doth begin by disseisin. But in all these cases of warranties that do begin by disseisin, this is the rule, that * they are

* P. 196.

(l) Not good since the above noticed act of the 4 Anne, c. 16. s. 21. which makes void all warranties by tenants for life.

(m) Warranty by tenant for life now void by the above noticed act of Anne.

altogether void and without force as to all others but to the parties themselves that do make them; and therefore they do not bar or bind any others at all of their right that have any. And the same law is of a warranty that doth begin by abatement or intrusion; that is, when an abatement or intrusion is made of purpose to make a feoffment in fee with warranty. And so also it is where the tenant dieth without heir, and an ancestor of the lord doth enter before the entry of the lord, and make a feoffment in fee with warranty; in this case this shall not bind the lord, because it doth begin by wrong^(*).

11. How a warranty shall be taken.

All warranties in general are favourably taken in law, because they are part of men's assurances. Every warranty in law is taken for, and hath the effect of, a lineal warranty.

The warranty that is made by *dedi & concessi* (o), or *dedi* only in a feoffment, is, and shall be taken for, a general warranty against all persons to the feoffee and his heirs, during the life of the feoffor only, albeit there be no service reserved by the deed nor heir named: but it shall not extend to the assignee of the feoffee. And if there be any service reserved on the deed, then it shall extend against the heir also. Co. 4. 81. 5. 17.

The warranty in law that is made upon a gift in tail, or lease for life, rendering rent, is a special warranty against the donor and lessor (p), and his heirs and assigns; so that the donee or lessee may vouch the grantor after the grant of the reversion, or the grantee of the reversion after the attornment of the tenant, at his election. Co. 4. 81. super Lit. 384.

The warranty in law that is made upon an exchange, is special in divers respects; for it extendeth reciprocally to and against the heirs of both parties; and it doth extend only to the same land that is given in exchange, and none other; and no use can be made of it but by voucher, for no *warrantia chartæ* doth lie upon it. So also the warranty, that is made in dower, is taken to extend only to the other two parts of the land. Co. 4. 121. super Lit. 384.

The warranty in law, that is made upon the tenure of homage ancestral, extendeth reciprocally to the heirs, and against the heirs of both parties. Co. super Lit. 384.

If a feoffment be made of land to three jointly, and the feoffors do warrant the land to the feoffees, and every of them; this warranty shall be joint and not several. But if the estate be several, as if one grant White Acre to A. and Black Acre to B. and grant to warrant the land to them, and either of them; in this case the warranty shall be several. Co. 5. 59.

If a man of full age, and an infant join in a feoffment with warranty; this shall be taken for a good warranty as to the whole for him that is of full age, and void for the infant, and not void in part, and good in part. Co. super Lit. 367.

(*) See more amply what shall be deemed warranty which commences by disseisin, abatement, or intrusion, and their operation, in Bac. Abr. Warranty (K). Com. Dig. Garranty (I. c.)

(o) See supra, page 183, note (n).

(p) See supra, page 160, notes (b) and (c), on implied warranty in leases.

Co. super Lit.
316.

Co. super Lit.
47. 385. Dier,
42. Kelw. 108.
Co. 6. 69.

If a man make a feoffment in fee, and bind his heirs but not himself * to warranty; in this case and by this, his heirs shall not be bound, and it seems also that it will not bind the warrantor himself. But if a man bind himself to warrant, and not his heirs, by the feoffment; in this case the feoffor himself is bound to the warranty, but not his heirs; for it is a maxim of law, that the heir shall never be bound to any express warranty, but where the ancestor was bound by the same warranty. If one make a feoffment to *B.* and his heirs, and thereby doth grant to warrant the land, and doth not say to *B.* and his heirs; yet this warranty shall be taken to extend to them. But if the feoffor doth grant to warrant the land to *B.* and doth not say to his heirs, this shall not extend to his heirs. And if in this case the warranty be to *B.* and his assigns, it shall not extend to his heirs, neither shall the assignees take advantage of it after the death of *B.* And if the warranty be to *B.* and his heirs, and not to his assigns also; this shall not extend to his assigns. If one make a feoffment to *A.* *habendum* to him and his heirs, and bind himself and his heirs to warrant the land *in formâ prædictâ*; in this case the warranty shall extend to the feoffee and his heirs.

* P. 197.

Co. 1. 1.

If one grant to warrant land to another and his heirs, and doth not say against what persons, this shall be taken for a general warranty against all men.

If one make an estate and grant to warrant the land, but doth not say how long, this shall be taken for as long as the estate to which the warranty is knit doth last.

Dier 328.

If a warranty be made against any special persons, it shall extend to them and no further; and it shall extend in all cases for and to all titles and entries upon title; and it shall not in any such cases extend to tortious and unlawful entries.

Co. super Lit.
366.

If a man be seized of a rent-seck, issuing out of the manor of *Dale*, and he take a wife, and the husband doth release to the terre-tenant, and warranteth *tenementa prædicta* and dieth; this warranty shall extend to the rent, as well as to the land; and therefore if the wife sue for her thirds of the rent, the terre-tenant may vouch the heir.

Co. super Lit.
388. 389.

And regularly the warranty doth extend to all things issuing out of the land, *viz.* to warrant it in the same manner and plight as it was in the hands of the feoffor, and he shall vouch as of lands discharged. And therefore if grantee of a rent, grant it to the tenant of the land on condition, and the tenant doth make a feoffment of the land with warranty; in this case the warranty shall not extend to the rent, albeit the feoffment be made of the land discharged of the rent. And if a woman have a rent-charge in fee, and she doth intermarry with the tenant of the land, and a stranger doth release to the tenant of the land with warranty; this warranty shall not extend to bar any action to be brought after the death of the wife for the rent. But if in this case the * tenant make a feoffment in fee with warranty and dieth, the feoffee in *curia in vita* brought by the wife shall vouch as of lands discharged at

* P. 198.

the time of the warranty made. So if tenant in tail of a rent-charge purchase the land and make a feoffment with warranty, and the issue bring a formedon of the rent, the tenant shall not vouch, &c. (q).

12. Who may take advantage of a warranty; and how and against whom it may be taken.
Assigns.

All those that are parties to the warranty, i. e. such as are named in the deed regularly, shall take advantage of the warranty; as if one doth warrant land to another, his heirs and assigns; in this case both the heirs and assigns take advantage of it, and they both may vouch or rebut, or have a *warrantia chartæ*, so as they come in in privity of estate; for otherwise the heirs or assigns cannot vouch, or have a *warrantia chartæ*; and yet they may rebut, notwithstanding, in divers cases. But those that are not named, for the most part, shall not take advantage of the warranty: and therefore if land be warranted to *I. S.* and not to him and his heirs, or to him and his assigns, or to him, his heirs and assigns; in these cases neither the heir nor the assignee may vouch or have a *warrantia chartæ*; and yet in some cases where it is so, the assignee or tenant of the land may rebut. Co. super Lit. 365. 5. 17.

The warranty annexed to an exchange, a partition, by *dedi* and by homage ancestrel, doth always go in privity; and therefore an assignee in these cases can take no advantage of it (r). And yet in the cases of exchange and *dedi*, an assignee may rebut. But the assignee of a lessee for life may take advantage of the warranty in law annexed to his estate. Co. super Lit. 384.

If one grant to warrant land to another, his heirs and assigns; in this case the heirs or assigns, heir of the assignee, or assignee of the heirs of the feoffee, or assignees of assignees *in infinitum*, shall take advantage of the warranty. And therefore if one infeoff *I. S.* to have and to hold to him, his heirs and assigns, and warrant the land to him, his heirs and assigns, and *A.* (s) doth infeoff *B.* and his heirs, and *B.* dieth; in this case the heir of *B.* shall vouch as assignee to *A.* And if one infeoff *A.* and *B.* *habendum* to them and their heirs, and warrant the land to them, their heirs and assigns, and *A.* die, and *B.* doth survive and die, and his heir infeoff *C.* in this case *C.* shall take advantage of this warranty as assignee. If one infeoff *A.* with warranty to him, his heirs and assigns, and *A.* doth infeoff *B.* and *B.* doth re-infeoff *A.* In this case neither *A.* nor his assigns shall ever take any advantage of this warranty (t). And yet if *B.* infeoff the heir of *A.* he may take advantage of the warranty. Co. 5. 17. super Lit. 384. 385.

(q) See further as to the operation of warranties, what rights and titles are barred by them, and how they shall be expounded and taken, in Vin. Abr. Voucher (B. 7.) Bac. Abr. Warranty (P.) Com. Dig. Garranty (F.)

(r) This is to be understood of the case of an implied warranty, or warranty in law; for in the case of an express warranty the assignees might have the benefit of it.

(s) *Quære.* Is not this a mistake? It would appear that *J. S.* must be meant both here and where *A.* next occurs.

(t) The reason of the above is not very clear, and it may be doubted, it is conceived, whether it is law; for why may not *A.* upon the re-infeoffment of *B.* be considered as coming in as assignee? and where the warranty is to one his heirs and assigns, it is stated just above, that the assignees of assignees *in infinitum* may take advantage of the warranty.

If one make a feoffment by deed with warranty to the feoffee, his heirs and assigns, and the feoffee doth make a feoffment over to another by word without deed; in this case the second feoffee shall * have all the advantage that an assignee by deed shall have (u).

* P. 199.

If a feoffment be made with warranty to a man and his heirs and assigns, and he make a gift in tail, the remainder in fee, and the donee make a feoffment in fee; this feoffee shall not vouch as assignee, but he must vouch his donor upon the warranty in law; and yet he may rebut.

If lands be given to two brethren in fee-simple, with warranty to the eldest and his heirs, and the eldest dies without issue; in this case, albeit the other brother be his heir, yet he shall have no advantage at all by the warranty, because he comes in above the warranty. But generally all that claim under the warranty shall take advantage whereof by way of rebutter, albeit they can take no other advantage by it.

If one make a feoffment to two, their heirs and assigns, and one of them doth make a feoffment in fee, this feoffee in this case shall not take advantage as assignee (x).

Co. super Lit.
385.

An assignee of part of the land shall take advantage of a warranty, as if a man make a feoffment of two acres with warranty to him, his heirs and assigns, and the feoffee doth make a feoffment of one acre of it to another; in this case the second feoffee shall take advantage of the warranty as assignee. And therefore herein there is a difference between the whole estate in part, and part of the estate in the whole or in any part: for if a man have a warranty to him, his heirs and assigns, and he make a lease for life, or gift in tail (y); in these cases the lessee or donee shall not take advantage of the warranty as assignee: but they may vouch the lessor, or donor, upon the warranty in law. But if a lease for life be made, the remainder in fee; such a lessee may vouch as assignee upon the first warranty. If the father have a feoffment made to him and his heirs with warranty, and he make a feoffment to his son and heir with warranty; in this case the son may take advantage of the first warranty after his father's death. If a man infeoff a woman with warranty, and they intermarry and are impleaded, and upon the default of the husband the wife is received; in this case she may vouch her husband. *Et sic e converso*. If a woman infeoff a man with warranty, and they intermarry and are impleaded: the husband in this case shall vouch himself and the wife.

Co. super Lit.
384.Co. super Lit.
390.26 H. 8. 3.
22 Ass. pl. 37.
29 Ass. 34.
Co. 3. 62. 63.

He that comes into the land merely by act of law in the post, as the lord by escheat, or the like, shall never take advantage of a warranty: and therefore if tenant in dower infeoff a villain with warranty, and the lord of the villain

(u) Since the statute of the 29 Car. 2. c. 3, no feoffment can be made without a writing.

(x) But if a feoffment, with warranty, is made to two and their heirs, and they both die, and the heir of the survivor infeoffs B. and his heirs, B. may vouch as assignee. See Co. Litt. 384 b.

(y) Keeping, it is to be understood, the reversion in fee in himself; for if he had parted with the whole estate, then it would seem the lessee for life, or donee in tail, might vouch as assignee. See Co. Litt. 385.

• P. 200.

enter; or a feoffee be to a bastard with warranty, and he die without issue, and the lord enter by escheat; in these cases the lord shall never take advantage of these warranties. But otherwise it is where a man comes to the land by limitation of use, or a common recovery, which is by the act of the party: for if tenant in tail, being in of another estate, i. e. by disseisin, or feoffment of a disseisor, suffer a common recovery, and a collateral ancestor of the tenant in tail doth release with warranty to the recoveror, and after the recoveror doth make a feoffment to uses which are executed by the statute of 27 Hen. 8. and after the collateral ancestor dieth, in this case the tenants may take advantage of the warranty by way of rebutter, albeit the estate be transferred in the post. So if he to whom the warranty is made, suffer a common recovery, and after the ancestor dieth; the recoveror may take advantage of this warranty by way of rebutter; for any man that hath the possession of land, albeit he have no deed to shew how he came by the possession of it, or how he is assignee, may rebut the demandant, and so bar him, and defend his own possession: and therefore the tenant by the curtesy, donee in tail that is in of another estate, an assignee by force of a warranty made to a man and his heirs, or feoffee of a donee in tail, may rebut and bar the demandant by the warranty.

If one infeoff another of an acre of ground with warranty, and hath issue two sons, and dieth seised of another acre of land of the nature of borough English; in this case, albeit the warranty descend upon the eldest son only, yet both the sons may be vouched. And so also it is of heirs in gavelkind; the eldest shall be vouched as heir to the warranty, and the rest in respect of the inheritance (z). And in like sort the heir at the common law, and the heir of the part of the mother shall be vouched, or the heir at the common law may be vouched alone at the election of the tenant. And in like sort the heir at the common law shall be vouched with the heir in borough English. And so also a bastard shall be vouched with a *mulier* (a). And if a man die seised of certain lands in fee, having issue a son and a daughter by one venter, and a son by another, and the eldest son entereth and dieth, and the land doth descend to the sister, in this case the warranty doth descend on the son, and he may be vouched as heir, and the sister also may be vouched as heir to the land.

Co. super Lit.
376. 1 Ed. 3.
13. 5 H. 7. 2.

(z) Concerning warranties annexed to gavelkind lands, it is said, generally, in several books, that every warranty which descends, descends to him that is heir by the common law. Co. Lit. 12 a. 376 a. Hob. 31. Cro. Jac. 218. But for the better understanding this rule with the proper restrictions, Mr. Robinson, in his Treatise on Gavelkind, p. 123, considers the authorities which treat more distinctly of this matter, under three heads; first, whether the younger sons, heirs in gavelkind, may take advantage of a warranty annexed to their estate: 2. Whether they shall be barred or rebutted by the warranty of their ancestor: and 3. Whether they may be vouched by reason of such warranty.

(a) The bastard may be vouched alone without the *mulier*, because the bastard is heir in appearance and shall not disable himself. Co. Lit. 376 b. Where a man has bastard *cigne & mulier puisne* and the bastard enters, a man shall vouch the *mulier* as heir at the common law, and shew how the bastard has entered into certain land of the father who made the warranty, and vouch him by the possession. Br. Abr. Voucher, pl. 119, cites 22 E. 4. 10. See further Vin. Abr. Voucher (U).

Co. 3. 14.
super Lit. 386.
16 H. 7. 13.
48 Ed. 3. 5.

If two make a feoffment with warranty, and the one die, the survivor shall not be charged alone with the warranty, but the heir of him that is dead shall be charged also. And if two be bound to warrant land, and both of them die; the heirs of both of them ought to be vouched, and shall be equally charged. And if the heir be vouched in the ward of three several persons, the one of them only shall not be charged, but they shall be charged equally.

Co. super Lit.
365.

If a woman, an heir of the disseisor, infeoff me with warranty, and after she is married to the disseisee; in this case, I may take advantage of * this warranty against the disseisee, and rebut him upon it, if he sue me for the land. So if the husband and wife sue me for the land of his wife, and I have a warranty of a collateral ancestor of the husband's descended to him; in this case I may make use of this to bar the husband and wife (b).

* P. 201.

Co. super Lit.
392. 393.

A warranty lineal or collateral may be defeated, determined, or avoided in all, or in part. And this is sometimes by matter in law, and sometimes by matter in deed.

13. When a warranty shall be said to be defeated, determined, or avoided: and how: or not.

Co. 10. 96.
1, 2, 3. 63.
Lit. sect. 741.
Co. super Lit.
392.

If the estate to which the warranty is annexed be gone, the warranty annexed thereunto is gone also. And therefore if an estate tail, to which a warranty is annexed, be spent, the warranty is determined. And if a man make a gift in tail with warranty, and after the donee doth make a feoffment, and die without issue, the warranty is gone. So if tenant in tail discontinue the tail, and the discontinuee be disseised, or make a feoffment on condition, and a collateral ancestor of the issue release to the disseisor or feoffee, on condition, with warranty, and after the discontinuee doth enter upon the disseisor, or on the feoffee for the condition broken; in these cases, the warranty made by the collateral ancestor is gone. So if a seigniori be granted with warranty, and the tenancy escheat, so that the seigniori is extinct; hereby also the warranty is defeated. So if a collateral ancestor heretofore had released with warranty, and then had entered into religion, this warranty had bound; but if after he had been dearraigned, the warranty had been defeated.

Co. super Lit.
384. Bro. Garran-
ty, 27.

If the father make a feoffment to his son and heir apparent, with warranty, and die, so that the warranty doth descend upon the son; hereby the warranty is gone. And yet if a feoffment be made to a man and his heirs, and he dieth leaving issue daughters: in this case the warranty shall be divided, and is not determined.

Lit. sect. 743.
Co. super Lit.
390. Lit. sect.
744.

If tenant in tail doth make a feoffment to his uncle, and after the uncle doth make a feoffment in fee with warranty, &c. to another, and after the feoffee of the uncle doth reinfcoff again the uncle, and after the uncle doth infeoff a stranger in fee without warranty, and dieth without issue, and the tenant in tail dieth; hereby the warranty made to the first feoffee is defeated. So if the uncle make the warranty to the feoffee, his heirs and assigns, and take back

(b) See accordingly, and farther who may take advantage of a warranty, against whom, and in what manner, in Bac. Abr. Warranty (N). Com. Dig. Garran-ty (C). (K). Vin. Abr. Voucher (I).

an estate in fee, and after doth infeoff another. But if one make a feoffment with warranty to the feoffee, his heirs and assigns, and the feoffee doth re-infeoff the feoffor and his wife, or the feoffor and a stranger; in these cases the warranty is not defeated, but doth continue still. So if two do make a feoffment with warranty to one, his heirs and assigns, and the feoffee doth re-infeoff one of the feoffors; in this case the warranty is not gone. And if in the first case the feoffee make an estate to his uncle in tail, or for * life, saving the reversion; or a lease for life, the remainder over, &c. in this case, the warranty is only suspended.

* P. 202.

If one make a feoffment or release with warranty, and after is attainted of treason or felony; hereby the warranty is gone; and albeit he do afterwards obtain his pardon, yet the warranty is not revived (c).

Co. super Lit.
391.

If a feoffment with warranty be made to two, or more, and they being joint-tenants do after by deed make partition; by this the warranty is determined (d). So if two joint-tenants be, and one of them disseise the other, and he that is disseised doth recover in an assise and hath judgment to hold in severalty; hereby the warranty is determined. So if *A.* and *B.* be joint-tenants of White Acre for life, and *A.* by fine doth grant to *B.* *totum & quicquid habet in tenementis*; hereby the warranty is gone. But if a partition be made by judgment upon a writ by force of the statute of 13 *H. 8.* this doth not defeat the warranty fallen to them; but it shall be divided between them, and they shall all of them take advantage of it.

Co. 6. 12.

Adjudged
Hil. 22 Jac.
*B. R. Eustace
& Shole's case.*

If one infeoff three with warranty to them and their heirs, and one of them release to one of the other two; hereby the warranty is gone for that part. But if one of them release to the other two; in this case the warranty is not gone, but doth continue, and they may vouch upon it.

Co. super Lit.
385.

If one infeoff two men and their heirs with warranty, and one of them doth make a feoffment in fee; hereby the warranty is not determined, but the other may take advantage of it notwithstanding.

Co. super Lit.
385.

Release.

If the party that hath the warranty, or the estate to which the warranty is annexed, release, to him that is bound to warrant, all warranties, or all covenants real, or all demands; by either of these releases the warranty is gone. So also if by a defeasance, made between the parties, it be agreed the warranty shall be void; by this defeasance the warranty may be avoided also. Or if it be so agreed that the warrantee or his heirs, &c. shall not

Co. super Lit.
393. 392.
Lit. sect. 748.

Defeasance.

(c) But if he had no issue at the time of the attainder, but after obtaining his pardon has issue, the issue will be bound by the warranty. See Co. Litt. 393. (a). and see the act of the 54 Geo. 3. c. 145. by which it is enacted, that no attainder for felony after the passing of the act, (except in the cases of high treason, petit treason, or murder, or abetting, procuring, or counselling the same) shall extend to the disinheriting of any heir, nor to the prejudice of the title of any one except the offender.

(d) S. P. in Hob. Rep. 25, *Roll v. Osborne*, and S. C. cited *per cur.* in the cases of *Hawkins v. Cardy*, in 1 Ld. Raym. 360. and 1 Salk. 65.

vouch,

vouch, or have a *warrantia chartæ*; by this the warranty is avoided in part.

Co. super Lit.
391.

If tenant in tail doth infeoff his uncle, who doth infeoff another in fee with warranty; if in this case the feoffee release the warranty to his uncle, hereby the warranty is extinct. But if a gift in tail be made with warranty, in this case, a release made by the tenant in tail of this warranty, will not extinguish it.

Co. super Lit.
390.

If the parties, between whom the warranty is, intermarry; hereby the warranty is suspended during the coverture in some cases.

Co. super Lit.
390.

If tenant in tail doth make a feoffment in fee with warranty, and disseiseth the discontinuee, and dieth seised, this doth suspend the warranty.

Co. super Lit.
393.

If two make a feoffment in fee, and warrant the land to the *feoffee and his heirs, and the feoffee doth release the warranty to one of the feoffors; this doth not determine the warranty of the other as to the moiety. So if one doth infeoff two with warranty, and the one of them doth release the warranty; this doth not extinguish the warranty for the other moiety, but it doth continue still.

* P. 202.

A warranty also may lose its force by taking benefit or making use thereof; for after a man hath once taken advantage thereof, in some cases he can make no further use of it: of which read *Co. super Lit.* 393. (e).

And now having done with deeds in general, and some of the parts thereof in special, we are in order to come to some special kinds of deeds; wherein we will first begin with a deed of Feoffment.

(e) See further in what cases a warranty shall be suspended, determined, defeated, or avoided, in *Bac. Abr. Warranty* (O.) *Com. Dig. Warranty* (I. 3.) 2 *Roll. Abr.* 740. *Vin. Abr. Voucher* (C. 6.)

CHAP. IX.

OF A FEOFFMENT.

1. Feoffment.
Quid,

Infeoff.

Feoffor.
Feoffee.

2. Quotuplex.

FEOFFAMENTUM, i. e. *Donatio feodi*, strictly and properly is the gift or grant of any honors, castles, manors, messuages, lands, houses, or other corporeal immoveable things of like nature, which be hereditable to another in fee-simple, i. e. to him and his heirs for ever, by the delivery of seisin and possession of the thing given. And from hence comes the word *infeoff*; for by this word and the words *give* and *grant* (as the most apt words for that purpose), is this kind of conveyance most commonly made (a). Hence also it is, that he that makes this feoffment is called the feoffor; and he to whom it is made, the feoffee. Also it is sometimes, but improperly, called a feoffment when an estate of freehold only doth pass (b).

This kind of conveyance albeit it may be made in most cases by word without any writing (c), yet is most commonly done by writing; and this writing is then called a deed or charter of feoffment: but hence is the division of a feoffment by word, or a feoffment by writing. The ancient forms and examples of these deeds are very brief; and yet they had these parts contained in them. 1. The premises. 2. The *habendum*. 3. The *tenendum*. 4. The *reddendum*. 5. The clause of warranty. 6. The *in cuius rei testimonium*. 7. The date. 8. The clause of *hiiis testibus*. *Hæc fuit condida illius ætatis fides & simplicitas, quæ pauculis lineis omnia fidei firmamenta possuerunt.*

New Terms of
the Law. Co.
super Lit. 9.
Lit. sect. 57.

See West.
Symb. part 1.
sect. 235. Co.
super Lit. 6.

(a) *Feoffment* is derived of the word *feodum*, *quia est donatio feodi*; for the ancient writers of the law called a feoffment *donatio*, of the verb *do* or *dedi*, which is the aptest word of feoffment. Co. Lit. 9 a. A feoffment originally signified the grant of a feud or fee: that was the original and proper notation of the word: nevertheless by custom it came afterwards to signify a grant (with livery of seisin) of a free inheritance, to a man and his heirs; respect being had rather to the perpetuity of the estate granted, then to the *feodal* tenure. Mad. Form. Angl. Dissert. p. 4. 2 Inst. 210. It has frequently been laid down, that in order to give validity to a feoffment, nothing more is necessary, on the part of the feoffor, than possession; and that where he has possession a *fee simple* always passes by force of the livery, (that is, where it purports to pass a fee simple), notwithstanding his possession was ever so bare and naked. See Burr. 92. Litt. sect. 595. 599. 611. 618. Co. Litt. 666(b). 377(a). The soundness, however, of this doctrine has been called in question. But the subject will be more fully noticed below; and see *supra*, page 19, note (i).

(b) There is no doubt, however, but that a mere estate of freehold may be conveyed by feoffment, provided it is an estate of freehold in possession; as to a man and his assigns during his own life, or to him his heirs and assigns during the life of another. See *infra*, text, 206. But if a man who is seised merely of a life estate, makes a feoffment *in fee*, it is a forfeiture of such life estate. See *infra*, text, 203.

(c) By the statute of Frauds (29 Car. 2. c. 3.), a *writing* is now necessary. A *deed* however, is not absolutely necessary, for the *livery* is the *operative* part of the assurance. But the writing is not only usually a *deed*, but it is advisable that it should be so; as in that case, if it should happen that the instrument could have no operation as a feoffment either from the want of livery or otherwise; it might, nevertheless, possibly have effect as a bargain and sale, if enrolled, as the grant of a reversion, a covenant to stand seised, &c. See *supra*, page 82, notes (w) and (y).

And

Co. super Lit.
D. 9 Co. 1.
11. 112.
How. 554.
H. 7. 24.
9 H. 6. 43.
Co. super Lit.
57. Perk.
sect. 310.
4 E. 3. 70.
Do. 1. 121.
Do. 6. 70.
Bro. scire
facias, 88.
How. 423.
124.

And this manner of conveyance, as it is the most ancient kind of conveyance, so is it the best and most excellent of all others, and in some respects doth excel the conveyance by fine or recovery: for it is of that nature and efficacy, by reason also of the livery of * seisin evermore inseparably incident to it, that it cleareth all disseisins, abatements, intrusions, and other wrongful and defeasible titles, and reduceth the estate clearly to the feoffee, when the entry of the feoffor is lawful, which neither fine, recovery, nor bargain and sale by deed indented and inrolled will do, when the feoffor is out of possession. And it passeth the present estate of the feoffor, and not only so, but barreth and excludeth him of all present and future right, and possibility of right, to the thing which is so conveyed: insomuch that if one have divers estates, all of them pass by his feoffment; and if he have any interest, rent, common, or the like into or out of the land, it is extinguished and gone by the feoffment. And farther, it barreth the feoffor of all collateral benefits touching the land, as condition, power of revocation, writs of error, attain, and the like; insomuch that if a man make an estate of his land upon condition, or with power to revoke it, and after he make a feoffment of the land; by this he is barred for ever of taking advantage of the condition, or power of revocation (d). It destroyeth contingent uses, gives away a future use inclusively, gives away a seigniori inclusively, and gives away a right of action: for both the feoffment, and livery of seisin incident thereunto, are much favoured in law, and shall be construed most strongly against the feoffor, and in advantage of the feoffee. And besides all this, because it is so solemnly and publicly made, it is of all other conveyances most observed, and therefore best remembered and proved.

3. The nature and operation of it.

* P. 204.

See Grant,
Numb. 4.
Co. super Lit.
2. 42. 43.

Perk. sect.
182, 183. 185.
Bro. Feoff-
ment, 2. 7. 8.
9. 17. 39 H. 6.
43. 21 H. 7. 7.

If the feoffment be made by deed, then must the deed be so made, written, read, sealed, and delivered, as all other deeds that are well made must be (e). For which see *Deed, supra, Chap. 4. Numb. 5.*

And in every good feoffment that is made, there must be a feoffor, i. e. a person able to grant the thing passed by the feoffment; a feoffee, i. e. a person capable of it, and able to take it, and a thing grantable, and it must be granted in that manner as law requireth. And for this, therefore, observe, that whosoever is disabled by the common law to take, is disabled also to make a feoffment, gift, grant, or lease; and many also that have capacity to take by such conveyances, have no ability to grant them; as men attainted of treason, felony, or in a *premunire*, aliens born (f), the king's villains, idiots, madmen, a man deaf, blind, and

4. Who may make or take a feoffment: and what shall be said a good feoffment: or not: and what things are requisite thereunto.

1. In respect of the persons thereunto, and the quality of their estate.

Aliens.

Idiots.

(d) But if the feoffor has no present interest in the land, nor by the cesser of the estate can prove any, there the feoffment is no extinguishment of a power of revocation, such power being merely collateral to the lands. See Co. Lit. 237 a.

(e) Since the statute of Frauds, 29 Car. 2. c. 3, there must be at least a *writing*, but it may doubted whether the instrument if it purports to be a *deed*, must have all the *requisites* of a deed: On the contrary, it is conceived, that if the statute of Frauds is complied with it will be sufficient.

(f) A feoffment by an alien, it is conceived, would be good, except as against the Crown.

- Feme covert.** dumb from his nativity, a feme covert (*g*), an infant (*h*), and a man by duress; for the feoffments, gifts, &c. of such persons may be avoided. But such persons as have committed treason or felony, if attainder do not follow, such as are attaind of heresy, a leper removed by the king's writ from the society of men, bastards, such as are deaf, dumb, or blind (*i*), that have understanding and sound memory, albeit they cannot express their intentions otherwise than by signs, those that are drunken (*k*), the villains of a common person, before entry, &c. also * excommunicate persons, and outlawed persons, albeit the king take the profits of their lands; all these may make feoffments, gifts, &c. and all these have capacity to take by such conveyances.
- Infant.**
- Attaind persons.**
- * P. 205.
- Outlawed persons.**
- Feme covert.** A woman that hath a husband, alone and by herself without her husband, cannot make a feoffment of her own land, and if she do so, it is void, albeit her husband agree to it. *Perk. sect. 185. 186.*
- Corporation.** Neither the head alone, nor any one, or more, of the members of a corporation aggregate of many, alone, may make a feoffment of any of the land belonging to their corporation. But all of them together may make a feoffment (*l*); and if any of them be seised of land in his own right, and in his natural capacity, he may make a feoffment of this land as another man may do; yea, he may make a feoffment of this land to the same corporation whereof he is a head or member, and so give and take also in a divers capacity. *Fitz. faits and feoffments, 39. Perk. sect. 205. 224. 225.*
- Ecclesiastical persons.** Ecclesiastical persons cannot make feoffments, gifts, &c. of their ecclesiastical lands for longer time than three lives, or twenty-one years; for all feoffments, gifts, grants, and leases by bishops, albeit they be confirmed by dean and chapter, or by any of the colleges or halls in either of the universities or elsewhere, or by deans and chapters, masters or guardians of any hospitals, parsons, vicars, or any other having spiritual or ecclesiastical living, are avoidable (*m*). *Co. super Lit. 43.*
- Husband and wife.** A man cannot make a feoffment to his own wife after the marriage is consummate. But after a contract made, and carnal knowledge had, he may make a feoffment to her, and such a feoffment will be good (*n*). *Perk. sect. 194.*

One

(*g*) See *supra*, page 7, note (*w*), as to a fine levied by a feme covert as a feme sole.

(*h*) A feoffment by an infant is not absolutely void, but merely voidable. *Perk. sect. 12. and Zouch v. Parsons, 4 Burr. 1806.* And by the custom of gavelkind, an infant of the age of fifteen years or upwards, who is seised in fee, may make a valid feoffment by livery *propria manu*. See *Robins. on Gavelk. 193, et infra.*

(*i*) See *supra*, page 54, latter part of note (*m*).

(*k*) But if advantage is taken of a man's inebriety to obtain a feoffment, a Court of Equity would set it aside.

(*l*) Or, more properly, the corporation by its corporate name, and as a corporate act, may make a feoffment, and not that it is necessary that every individual of the corporation should be present, unless it should be so required by the constitution of the corporation, which, probably, is very rarely the case. See, on the subject of concurrence in corporate acts, *Bac. Abr. vol. ii. p. 16.*

(*m*) If they exceed three lives or twenty-one years, under the statute of 15 Eliz. c. 10. But see further on this subject, in the chapter on Leases. But under certain restrictions, ecclesiastical persons may exchange lands. See act 17 Geo. 3. c. 53.

(*n*) Though a husband cannot convey to his wife immediately, yet he may give to a trustee for her benefit, and the gift will be good. Therefore he may convey land to her by way of use, as by conveying

York. sect.
Fitz. fails
in feoffments

One joint-tenant cannot make a feoffment of his part of the land to his companion, for a man cannot give a possession to him that hath it before (o). And hence it is also that the lessor cannot make a feoffment to his lessee for life, years, or at will. And yet perhaps a feoffment in this case, if it be in writing, may work as a confirmation. But one tenant in common, or one coparcener may make a feoffment of his part of the land to his companion.

Joint-tenants.
Tenants in
common.

Pro. feoffment,
Perk. sect.
22.

If a man make a feoffment of another's land, it is a disseisin (p), but a good feoffment against all men but the disseisee himself. And if four join in a feoffment of land, and three of them have nothing in the land, and the fourth hath all the estate; this is a good feoffment.

Disseisor and
disseisee.

Perk. sect.
197. Co. super
Lit. 48. 49.

A disseisor cannot make a feoffment of the land to the disseisee, but it will be void, for the disseisee will be remitted. But a disseisee may make a deed of feoffment and a letter of attorney to enter and give livery; and if the attorney do so, this will be a good feoffment.

Fitz. fails and
feoffments,
21.

No feoffment, or livery of seisin can be made to the king, for he doth always give and take by matter of record (q).

Prerogative.

feoffing or covenanting with another to stand seised; or surrendering a copyhold estate to her use. And according to some books, by the custom of a particular place, as of York, the wife may take by immediate conveyance from her husband. See note 1 to Co. Lit. 3 a. 13th edition, and Co. Lit. 112 a.

(o) But he may make a feoffment of his moiety to a stranger, see *supra*, text, 203. And one joint-tenant may release to the other, Co. Lit. 200 b.; and there can hardly be a doubt but an instrument between joint-tenants, which purported to be a feoffment, would be construed to operate as a release. If there are three joint-tenants, and one of them releases to one of the other two, the release, as to the share released, is tenant in common with the remaining joint-tenant, but they are still joint-tenants as to the other two shares.

(p) With respect to the doctrine that a feoffment works a disseisin, or acquires an estate in fee-simple, when made by a person who was merely in possession, however bare and naked such possession was; it may be observed, that such a doctrine is little consonant to the principles of justice, and it may be doubted whether such a feoffment would have had any such operation during the earlier periods of our feudal polity, when feoffments were made with much more solemnity than in modern times, and when too the feoffment was accompanied by an actual transmutation of the possession of the lands, and the feoffee was admitted tenant to the lord;—circumstances, all of which are wanting, to the secret and tortious feoffments we are speaking of, and therefore the late Lord Mansfield might well call in question the operation ascribed to them. See *Atkins v. Horde*, Cowp. 689, and 1 Burr. 60. Such tortious feoffments, it is held, may be made by a copyholder, by a mere tenant for years, or at will, by elegit, statute merchant, or staple; but if such persons make a feoffment, it will clearly occasion a forfeiture of their respective interests, so that in most cases it would be an extremely hazardous mode of endeavouring to acquire a fee-simple. [But see *supra*, page 155, note (h).] Where, too, a copyholder or tenant for years or at will makes such feoffment and levies a fine, and still continues in possession performing his services, or paying his rent, *there* the feoffment and fine will be deemed to be founded in fraud, and such fraud will prevent their barring the lord or the lessor. *Farmer's case*, 3 Rep. 77 a. And supposing no fine was levied, but a feoffment merely made, and the copyholder or lessee continued in possession performing his services or paying his rent, could it, in that case be contended that the lord or lessor had lost his right after sixty years possession on the part of the copyholder or lessee? It is apprehended it could not; and that the same ground might be resorted to to avoid the operation of the feoffment, viz. that of fraud, as may be resorted to in order to avoid the joint operation of a feoffment and fine. And even admitting a feoffment, in the cases above noticed, to have the operation ascribed to it, yet, if the copyholder continued to perform his services, and the lessee to pay his rent, might not the relations of lord and tenant, and of lessor and lessee be considered to be revived, and consequently the lord and lessor to be remitted to their former estate, and in this way might not the operation of the feoffment be avoided? Before concluding this subject, it may be proper to notice, that it is held, that if a person who has no interest at all in lands goes upon them whilst the possession is vacant and makes a feoffment, that such feoffment will work a disseisin; but in such a case if the true owner re-enters into possession of the lands, such re-entry, it is conceived, will work a remitter and avoid the feoffment.

(q) See more amply who may make a feoffment, and to whom, in 4 Co. 135. 8 Co. 42 b. Bac. Abr. Feoffment (D.) 1 Wood. 499. Vin. Abr. Feoffment (E.)

A feoff-

2. In respect of the matter whereof it is made.

* P. 206.

A feoffment may be made at this day of any thing which doth • lie in livery, by whatsoever tenure it be held, notwithstanding the statute of *Magna Charta*, cap. 32. But in some cases where a man doth alien his land held of the king, he must have the king's licence before-hand to do it, or else he must pay a fine to the king afterwards for not having a licence. But of such things whereof no livery of seisin can be made, no feoffment can be made.

Co. super Lit.
49. 21 H. 7. 7.
See infra at
Numb. 9.
Grant, 5.

One may make a feoffment of a moiety, third, fourth, or fifth part of his manor or other land, and that by the name of a moiety, third, or fourth part.

Co. super Lit.
190.

A feoffment may be made of an upper chamber over another man's house beneath.

Co. super Lit.
48.

If there be a meadow of one hundred acres, which time out of mind hath been divided amongst divers persons, and each person hath a certain number of acres, but in no certain place, the custom being to allot each person his number one year in one place, and another in another *alternis vicibus*; in this case, either of these persons may make a feoffment of his part, by the name of so many acres lying in such a meadow, without any bounding or describing of it.

Co. super Lit.
4. 48.

If parceners have made partition of their land, that the one shall have it from Easter to Lammas, to her and her heirs, and the other shall have it from Lammas to Easter, to her and her heirs, or that the one shall have it one year, and the other the other year *alternis vicibus*: or if they have two manors descended, and they agree that the one shall have the one manor one year, and the other the other manor the same year, and the next year that he that had the one shall have the other *alternis vicibus* for ever; in these cases the parceners may either of them make a feoffment of this land or manor (r).

Co. super Lit.
4. 48.

3. In respect of the presence or possession of other persons on the land at the time of the feoffment made.

If there be any lease for life or years in being of that land or thing whereof the feoffment is made, and he that hath this lease for life or years, or in his absence his bailiff or servant keeping in the house or land whereof the feoffment is to be made, doth give leave and agree that livery of seisin shall be given upon the house or land by the lessor himself or by his attorney, and for this cause doth leave the possession of the house or land, and thereupon livery of seisin is made; this is a good feoffment and a good livery of seisin, and yet it doth not prejudice the estate of the lessee. And if the lessor make a feoffment of the land to a stranger by assent or licence of the lessee, the lessee then being on the land; this is a good feoffment. In like manner as it is, where the lessor doth enfeof a stranger to which the termor doth agree saving his term. And if the lessor make such an entry upon the lessee for life, or years, as to put him out of possession of the house or land, and then he doth make a feoffment and livery of seisin of it; or if the lessor in the absence of the lessee, his wife, servants, and children, enter upon the thing in

Co. 2. 52.
Dier, 340. 18.
Perk. sect.
221. 21 H. 7.
7. Perk. sect.
220. 46 E. 3.
25. Bro. feoff-
ments de terre,
86. Co. super
Lit. 48, 49. 52.

(r) See further of what things a feoffment may be made, Com. Dig. Feoffment (A. 2.) Vin. Abr. Feoffment (C).

lease and make * a feoffment and livery of seisin thereof; in these cases there is as good feoffment to pass the reversion, for in these cases, when the lessee for life or years doth re-enter, the law doth adjudge this to be an attornment in law. But if a lessor will enter upon his lessee, and against his will (the lessee being still in possession of the land) make a feoffment of the land, and give livery; this is void, and can never take effect as a feoffment. And therefore if there be a conveyance made of a house and thereunto belonging in lease, and the feoffor comes into part of the land without the leave of the lessee, and there make livery of seisin of that part in the name of all the rest of the land, (the lessee himself, his wife, child, or servant being then upon any other part of the land, and especially if they be in the house) this is no good feoffment for any part of the land, but void for the whole. And yet if the lessee for years make an under-lease of part of the land to another, and the feoffor doth make a feoffment of this part, and give livery of seisin upon this part; in this case the possession of the first lessee in the residue will not hurt the feoffment, or livery for this part, but it is a good feoffment(s). Also if the lessee give the lessor leave to make livery, and depart and leave a servant of the lessee upon the land; in this case it seems his presence upon the land whilst the livery is made will not hurt. And so if the lessee leave the possession and leave nothing upon the land but his cattle; they will not keep his possession, nor prejudice the livery of seisin (t).

Attornment.

Veynor's case,
Trin. Jac.
B. R.

Co. super Lit.
48.

21 H. 7. 7.
Dier 18.

If a lease be made of one acre to one, and another acre to another, and the lessor make a feoffment of both these acres, and make livery in one of them in the name of both acres; this is no good feoffment for the other acre, for by this livery he is not put out of possession of that acre. So if one make a feoffment of two manors, the one in possession and the other in lease, and give livery of seisin of the manor in possession in the name of both the manors; this is no good feoffment for the other manor, neither will it pass by this feoffment. So if one make a lease for years of a house, and after make a feoffment in fee of the house and of a close adjoining, and give livery of seisin of the house, the termor's wife and children being then in the house, in this case this is no good livery neither to pass the house nor the close.

Perk. sect.
222. Dier
362.

If lessee for life, or years, make a feoffment of the land, Forfeiture.
the lessor being then upon the land and not contradicting it; it seems this is a good feoffment, and that the presence of the lessor upon the land, especially if he do not contradict it, will not hinder the virtue of the feoffment as against the feoffor and all others; but the lessor may

(s) In this case, it is presumed, it is to be understood that the consent of the under-lessee was obtained.

(t) Lord Coke's words are, "if the lessee be absent, and hath neither wife nor servants (though he hath cattle) upon the grounds" the livery of seisin shall be good. Co. Lit. 48 b. But if the lessee consents, though he be upon the ground, the livery is good. T. 40 Ed. 3. *Shepherd and Gray*. See further in note (s) to 15th edition. Co. Lit. 48 b.

enter afterwards for the forfeiture notwithstanding if he please (u).

Husband and wife.

* P. 208.

If the husband alone make a feoffment of the land, he hath in the * right of his wife, or that he hath jointly with his wife, his wife being then upon the land and disagreeing to it; in this case the feoffment is good against the feoffor, and all others, but the wife, who notwithstanding her presence and disagreement, may after his death avoid it (x).

Perk. sect. 223.

Joint-tenant.

If one joint-tenant make a feoffment of the whole land, his companion being then upon the land; by this there doth pass no more but a moiety, and the feoffment is void as to the moiety of his companion, for the feoffment doth not give his moiety.

Perk. sect. 220.

If a man enter into any land by wrong, and make a feoffment of it to a stranger, I being then upon the land; this feoffment is void, for in this case the law doth adjudge me to be always in, and never out of the possession (y).

Perk. sect. 219.

Prerogative.

If the king have any possession of the land by wardship or otherwise, the owner of the land can make no feoffment of it. And therefore if the king be entitled to land by wardship, or primer seisin (z), after office found after the death of an ancestor of one of his tenants; in this case it is said the feoffment of the heir is void and passeth nothing, for the king is still in possession. And if it be before office found it will be all one, for the office shall relate to the death of the ancestor. And yet in these cases the feoffment is good against the heir himself, and all others besides the king. If the heir, before office found, enter and make a feoffment, and then the king doth pardon the feoffee; in this case the feoffment is good. And yet such a feoffment after office with a pardon is void. And the like law is if the entry be before office, and the pardon after the office; for this is void also. But if a man be outlawed for debt or trespass, and thereupon the king hath the profits of the lands; in this case the owner may make a feoffment of this land notwithstanding.

Perk. sect. 219. Bro. Feoffment. 3. 17. 21 H. 7. 7. 2 H. 6. 5. 1 H. 7. 5. Stamf. prer. Regia, 40.

Outlawed persons.

4. In respect of the manner of making of it.

Reversion.

Divers persons cannot make a feoffment but it must be by deed, as corporations, and such like: also divers things cannot be granted by a feoffment, but the feoffment must be by deed, for a feoffment cannot be made of a reversion of land but it must be by deed. But a lease may be made of land to one for life, the remainder to another in fee, and this may be done without any writing by word only. Also a feoffment may be made of the moiety, third, or

Fitz. Feits and Feoffments, 32. See Grant, Numb. 4.

(u) If the lessor should not enter for a forfeiture, but on the contrary should suffer five years to elapse after the expiration of the term, and the lessee, after making the feoffment, levied a fine on the feoffor with proclamations, and there was five years non-claim; would the lessor, in such a case, if free from disabilities, be barred? See *supra*, page 205, note (p).

(x) See the act of the 32 Hen. 8. c. 28. s. 6. which prohibits discontinuances by husbands seized *jure uxoris*, and gives the wife or her heir a right of entry notwithstanding such discontinuance.

(y) But if a feoffment is made by a stranger, who enters upon the land when neither the owner of it or his tenant is upon it, does the feoffment in that case work a disseisin? See *supra*, page 205, note (p).

(z) Wardship taken away by the act of 12 Car. 2. c. 24.

Lit. sect. 60. fourth part of a manor, or of a piece of land without
 super Lit. 190. deed. And yet if one be seised of a manor, whereunto
 an advowson is appendant, and he make a feoffment of
 three acres parcel of the manor, together with the advow-
 son to two men, *habendum* the one moiety with the ad-
 vovson to one of them, and the other moiety to the other;
 in this case the feoffment cannot be well made unless it be
 by deed (a).

Lit. sect. 250. If a lease be made for five years, on condition that if
 the lessee pay to the lessor within the two first years ten
 pounds, then that he shall * have the land to him and his
 heirs, or otherwise but for five years; in this case if livery
 of seisin be made to the lessee before his entry this is a
 good feoffment. *Et sic de similibus.*

* P. 208.

Lit. sect. 59. Every feoffment also whether it be made by deed or Livery of
 66. Co. super without deed must be made with livery of seisin, and this
 Lit. 52. Doct. livery of seisin must be made according to the rules of
 & Stud. 13. livery and seisin herein after laid down, for this is of the
 essence of a feoffment, and a feoffment is not accounted
 perfect until livery of seisin be made, for until then, the
 feoffee hath only an estate at will in the land, and the
 feoffor may put him out when he will. And if either of Equity.
 the parties die before the livery of seisin be made the
 feoffment is void, and no warrant of attorney to make
 livery can be executed after the death of the feoffor or
 feoffee, neither is there any remedy in this case to get the
 assurance to be made perfect but in a Court of Equity (b).
 But in case where there are many feoffees, there the death
 of one or some of them will not hinder the livery, but if

(a) By the statute of 29 Car. 2. c. 3. s. 3, it is enacted, "That no leases, estates, or interests, either
 of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest
 of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned,
 granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning,
 granting, or surrendering the same, or their agents thereunto lawfully authorised by writing, or
 by act and operation of law."—And, by the same statute, it is enacted, "That all leases, estates,
 interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any mes-
 suages, manors, &c. made or created by livery and seisin only, or by parol, and not put in writing,
 and signed by the parties so making or creating the same, or their agents thereupon lawfully au-
 thorised, by writing, shall have the force and effect of leases or estates at will only, and shall not
 either in law or equity be deemed or taken to have any other or greater force or effect; any con-
 sideration for making any such parol leases or estates, or any former law or usage to the contrary,
 notwithstanding."

(b) See *Jackson v. Jackson*, Fitzgib. Rep. 146. S. C. in select Cases in Chancery, 81. See also
Bokenham v. Bokenham, 1 Chan. Ca. 240. And where a defective conveyance is aided it shall be dis-
 charged of mesne incumbrances by the party; as if a mortgagee wants livery, and the heir (or mort-
 gagee himself) confesses judgments to another, the mortgagee shall hold discharged from the
 judgments. *Burgh v. Burgh*, Rep. in Chan. Temp. Finch, 28.—The assistance and relief, afforded
 by a Court of Equity, in aid of a defective conveyance, is very extensive; it will remedy not
 only mistakes in form or upon the face of the deed; but will supply the material part or essence of a
 conveyance; as livery to a feoffment, a surrender of a copyhold, &c.—In what cases, and in what
 manner, equity will aid defective conveyances, reform erroneous ones, &c. see supra, p. 85, note (d),
 and see Com. Dig. Chancery (2 T.) Copyhold (P. 2.) Eq. Ca. Abr. Deeds (D.) Vin. Abr. Fairs (T. ...)
 And where the parties have acted upon any erroneous construction, which they have themselves put
 upon a deed, neither courts of law or equity will hold them to be bound by such erroneous construc-
 tion. See *Moore v. Foley*, 6 Ves. 238. *Eaton v. Lyon*, 3 Ves. 694. *Iggulden v. May*, 9 Ves. 325. And
 see 5 Durnf. & East's T. R. 567. It may be proper to observe, that it is not always necessary to have
 the aid of equity in the case of a defective feoffment; for even if the deed cannot be rendered avail-
 able at law, by holding it to operate as the grant of a reversion, covenant to stand seised, &c.; yet if
 the feoffor has been twenty years in quiet possession, courts of law will presume that livery was given.
 See *Rex v. Lloyd*, Wightw. 123.

5. Livery of seisin, *Quid*.

may be made to him or them that do survive: we must see therefore in the next place what this livery of seisin is.

Livery of seisin, or giving of possession, is a solemnity or overt ceremony, required by law, and used for the passing of lands or tenements corporeal, as an evidence or testimonial of the willing departing by him that makes the livery, from the thing whereof livery is made, and the willing acceptance thereof by the other party (c). And this is as ancient as a feoffment; for no feoffment is made without livery of seisin, albeit livery of seisin be sometimes made upon other conveyances. And it was first invented as an open and notorious act to this end; and that by this means the country might take notice how lands do pass from man to man, and who is owner thereof; that such as have title thereunto may know against whom to bring their actions; and that others may know that have cause, of whom to take leases, and of whom to require wardships, &c. And by this means, if the title come in question, the jury can the better tell in whom the right is. And of this livery of seisin there are two kinds. 1. A livery in deed. 2. A livery in law, called a livery within view. The livery in deed, is, when the feoffor, donor, &c. by himself, or another, taketh the ring of the door of the house, or a turf, or twig of the land, and delivereth the same upon the land unto the feoffee, donee, &c. in the name of seisin of the house, or seisin of the land. And this is done sometimes by the parties themselves if they be present, and sometimes in their absence by their attorneys or procurators. The livery in law, is, where the feoffor saith to the feoffee, being in view of the land, I give you yonder house to you and your heirs, go enter into the same, and take possession thereof accordingly, or the like (d).

New terms of the law.

West 2. part
Symb. sect.
251. Co. super
Lit. 48.

6. *Quotuplex*.

Co. super Lit. 48.

7. The nature and operation of it.

* P. 210.

Because this manner of conveyance by feoffment is so ancient, * therefore this ceremony (being inseparably incident to a feoffment) is much favoured in law: and therefore it is expounded and taken strongly against him that doth make it, and beneficially for him to whom it is made. And for this cause, it worketh not only to transmit the present estate, but also to bar all present and future rights and possibilities. If therefore one make a lease for life to *I. S.* the remainder to the right heirs of *I. D.* (which *I. D.* is then living) and give livery of seisin according to the deed; in this case, albeit he in remainder be not capable of this remainder, yet by the livery it shall pass out of the feoffor, and shall be in abeyance during the life of *I. S.* (e). So if a feoffment be made to one & *hereditibus*,

Bro. Estates 4.
Plow. 28, 29.

(c) *Seisin* is a technical term, to denote the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass: per Lord Mansfield, 1 Burr. 107.—For the original intent and manner of transferring lands by livery of seisin, see Spel. Gloss. 510. Mad. Form. Angl. Dissert. 9.

(d) In what cases livery may be made within the view, see Vin. Abr. Feoffment (M.) and further as to the different kinds of livery, in Bac. Abr. Feoffment (A.) Com. Dig. Feoffment (B.)

(e) On the subject of abeyance, see Fearn's Contingent Remainder, (Mr. Butler's ed.) 353. See infra, page 211, note (m).

without

without the word [*Seis.*] (*f*) and livery of seisin be made of the deed; this livery perhaps may make the estate good (*g*).

Co. 5. 92. Lit.
sect. 70. Co.
6. 26. Doct. &
Stud. 15. Co.
super Lit. 49.

Livery of seisin is needful, and must be had and made, in all cases where any estate of fee-simple, fee-tail (*h*), or for a man's own or another man's life, is made or granted by writing, or word (*i*), in the country of any lands or tenements corporeal. And so also where one doth make a lease of land to another for years, the remainder to a stranger in fee-simple, fee-tail, or for life; in these cases, livery of seisin must be had and made to the lessee for years, or else nothing will pass to him in remainder; and yet the lease for years will be good. And so also where a lease for years is made, upon condition that if such a thing happen the lessee shall have the fee-simple; in this case, the lessee must have livery of seisin before his entry, otherwise the estate will not increase (*k*). And so also if the king make a feoffment of the land he hath in the right of the Duchy of *Lancaster* that is not within the county Palatine; in this case, livery of seisin must be made as in the case of a subject. And in all these cases where livery of seisin is requisite, and it is not made, there doth pass no estate by the conveyance but an estate at will at the most.

8. Where and in what cases it is requisite: or not.

Co. super Lit.
216.

Plow. 214.
219.

Co. 2. 23. Lit.
sect. 59.
Co. super Lit.
49.

But livery of seisin is not needful or requisite to be had and made, in cases where any estate or fee-simple, fee-tail, or for life, is made, or granted, of any lands, by matter of record, as, by the king's letters-patents, fine, recovery, deed indented and inrolled, and the like: nor is it needful where any such estate is created by way of covenant and raising of use, by way of exchange, endowment *ad ostium ecclesie*, or *ex assensu patris*; nor is it needful where any such estate is passed or granted by way of surrender, devise, release, or confirmation, or by way of increase or executory grant; as when the fee-simple is granted to the lessee for life or years in possession: neither is it requisite, or can be made, where any incorporeal hereditaments, as reversions, rents, commons, or the like, are granted in fee-simple, fee-tail, or for life: for in some of these cases there is an attornment (*l*) to be made that doth * supply a livery: neither is it requisite in some cases where an estate of freehold is made of a corporeal thing; as if a house or

* P. 211.

(*f*) See *supra*, page 101, note (*y*).

(*g*) As to the operation of livery to pass a future interest, where the feoffor is out of possession; and in what cases several parcels will pass by one livery, or where several parties may take by a livery to one, see *Bac. Abr. Feoffment* (B.)

(*h*) A feoffment by tenant in tail in possession works a discontinuance, and takes away the right of entry of the issue in tail or remainder-man and drives him to his action of *formedon*. But a feoffment has only this effect where made by a tenant in tail in possession; for if a tenant in tail immediately expectant upon a life estate, joins with the tenant for life in making a feoffment, it seems that this is no discontinuance. See *Bredon's case*, (latter part) 1 Rep. 76. On the subject of discontinuance, p. 32, note (*g*).

(*i*) Cannot now be by parol. See the Statute of Frauds, 29 Car. 2. c. 3.

(*k*) But he would have the term without any livery.

(*l*) Attornment is now rendered unnecessary by the act of the 4 Ann. c. 16. s. 9. But see this act more fully noticed in the chapter on Attornment.

land belong to an office, and the office be granted by deed; in this case, the house or land doth pass as incident thereunto. So if a house or chamber belong to a corody; in this case, by the grant of the corody, the house or chamber passeth without any livery of seisin. Neither is it requisite upon a lease for years; for if a man make a lease for one thousand years, this lease is perfect by the delivery of the deed without any livery of seisin. Neither is it needful where one doth grant to me and my heirs all the trees growing on his ground; for these will pass without any livery of seisin at all.

Co. 8. 127. 11.
49.

9. How it may be and must be made: and what shall be said a good livery of seisin: or not.

1. In respect of the persons that make it, and to whom it is made, and the quality of their estate.

Woman
covert.
Infant.

Livery of seisin may and must be made either by the party himself that maketh the estate, or if it be a livery in deed, it may in his absence be made by his attorney sufficiently authorized by writing. And he that may make an estate, to the perfection whereof livery is requisite, may himself, and in his own right, make livery thereupon; and in the right of another, and as attorney to another; so divers that cannot make any estate, may notwithstanding make livery of seisin. And therefore the husband albeit he may not make a feoffment in fee, or lease for life, &c. of land to his wife, yet he may as an attorney make livery of seisin to her upon a conveyance made by another. And so also may the wife upon a conveyance made to the husband or her. And so also monks, infants, aliens, and such like persons disabled to make feoffments, &c. may notwithstanding make livery of seisin as attorneys upon conveyances made by others. And so likewise may he in remainder in fee make livery to the lessee for years. *Et sic de similibus.* And this livery of seisin may and must be made to the party himself that taketh the estate, or in his absence to his attorney or procurator sufficiently authorized: and in this case any one may be an attorney to take that may be an attorney to give livery. If a feoffment be made to divers by deed, and livery of seisin is made to one or some of them; this is a good livery to execute the estate to them all. But if a feoffment be made to divers without deed, and livery of seisin is made to one or some of them in the name of all the rest; in this case, the feoffment is good to execute the estate in him or them to whom the livery is made, and void as to the rest. If a lease for years be made to A. and B. without deed, the remainder to D. in fee, and livery of seisin is made to A. or B. in this case this is a good livery to make the remainder to pass to D. But if a lease be made for years to A. the remainder to the right heirs of I. S. in fee I. S. being then living, and livery of seisin is given to A. this remainder is void, for *nemo est heres viventis* (m). One joint-tenant cannot make livery of seisin to his companion as a tenant in common may. And a lessor cannot

Park. sect.
184. Co. super
Lit. 48, 49. 52.

Co. super Lit.
48, 49.

Dier 35. Co.
super Lit. 49.
359. Co. 5. 95.

Co. super Lit.
217.

Perk. 1. 40.
10 E. 4. 3.

(m) Being a *contingent* remainder, it is void from the want of an estate of freehold to support it. See *supra*, page 210, where the case is put of a lease to J. S. for *life*, remainder to the right heirs of J. D. who is living. In this case the remainder, though *contingent*, is *not* void, there being an estate of freehold to support it.

make livery of seisin to his lessee for life or years (n).
See before, *numb.* 4.

Co. super Lit.
32.

In all cases where this ceremony is requisite, whether it be done by the parties themselves in person, or their deputies, it must be done and made, 1st. in the life-time of the feoffor, donor, or lessor, and in the life-time of the feoffee, donee, or lessee; for if either of them die, it cannot be done afterwards; neither can a warrant of attorney be made to deliver seisin after the death of the feoffor, &c. But if there be more feoffees, donees; or lessees, than one; in such cases, albeit all of them die but one, the livery of seisin may be made to that one that doth survive, and it will be good to him to execute the estate in all the land. And so it is if there be a warrant of attorney made by a corporation aggregate, as a mayor and commonalty, dean and chapter, or the like, to give livery of seisin, in this case the death of the mayor, &c. will not determine the authority (o); and therefore in that case the livery of seisin may be made after his death.

2. In respect of the time when it is made.

Co. super Lit.
49. 316. Perk.
sect. 305.

2. If it be a lease for years with a remainder over in fee, the livery must be made to the lessee for years before his entry or at the time when he doth enter for that purpose; for afterwards it cannot be made (p). *Quod semel meum est, amplius meum esse non potest.* *Quere* also whether the law be not so in all other cases; and let men take heed they do not (as commonly they do) enter into the land before they have livery of seisin made thereof unto them. And yet it seems the livery of seisin is good, when it is made afterwards, by Co. 2. 55. 3. It must not be made before the estate begin; for if a lease be made for years to begin at *Michaelmas* with a remainder over, and the livery of seisin is made before *Michaelmas*; this livery of seisin is void; for if a livery work at all, it must work presently; and so it cannot in this case, because it is before the estate doth begin.

A caveat.

Co. super Lit.
217.

If an estate be made of divers pieces of land in divers villages in the same county; in this case, the making of livery of seisin of and in any part thereof, in the name of all the rest, or of one parcel according to the deed, albeit he doth not say in the name of, &c. sufficeth for all, if all the pieces be in the grantor's possession and out of lease. But if the pieces of land lie in divers counties; or in the same county, and they be in lease, or out of the possession of the feoffor, *contra*; for in that case the making of livery in one part in the name of all the rest, is not sufficient for the rest; for in this case, it is requisite that livery

3. In respect of the place or thing where in it is made.

Co. super Lit.
48. Perk. sect.
227, 228. Doct.
& Stud. 3.
Lit. sect. 61.
418. Perk.
sect. 226. Fitz.
Feoffments &
Fairs, 111.

(n) This is to be understood of the case of a lessee for life or years, whose estate is *previously* created, and not of the case of a lessee for life or years whose estate is created at one and the same time with the remainder.

(o) Because notwithstanding the death of the mayor the corporation still continues, and the authority contained in the letter of attorney, is not the authority of the mayor but the authority of the corporation, and therefore as the corporation continues the authority continues; but it is doubted whether the authority can be exercised until a new mayor is elected, for during the vacancy of the office of mayor, it would seem that the capacity of the corporation is suspended.

(p) If the lessee entered generally, without claiming to enter merely by virtue of the term, might not he be considered as entering for the purpose of receiving livery and consequently the livery be good, though made after the entry?

* P. 213.

of seisin be made upon and in some of the lands in both counties (g), and upon every parcel of land that is out of possession, or at least in some parcel of the land in the occupation of every several tenant. And yet if one part of a manor be in one county, and the other part in another county in view of that part; in this case it seems livery of seisin in the one part in the one county, in view of the other part in the other county, is good and sufficeth for all*. So if the scite of a manor lie in one county, and the rest of the manor in another county; in this case, the making of livery in the scite of the manor is sufficient for the whole manor. If a feoffment be made of the manor of *Dale* in *Sale*, the which manor doth extend in *Dale* and *Sale*, and livery of seisin is made accordingly in *Dale* only and not in *Sale* also; by this feoffment there doth pass no more of the manor but that which is in *Dale* only. If I be seised of one acre in fee, and of another acre for life, and I make a feoffment of both acres, and make livery of seisin in that acre whereof I am seised in fee in the name of both acres; in this case it seems this sufficeth to pass both the acres. But if I be seised of one acre in fee, and possessed of another acre for years, and I make a feoffment of both acres and livery of seisin in that acre only whereof I am seised in fee, in the name of both the acres, *contra*; for this is as if I make a feoffment of land whereof I am seised, and of other land whereof I am not seised, &c. If I be seised of two acres of land, and let one of them for years, and then make an estate of both of them to another, and make livery of seisin in that I have in possession, in the name of both the acres; this will not serve to pass the other acre, but livery must be made in that acre also. And accordingly it was agreed in a case in the King's Bench, *Hil. 38 Eliz.* which was, that a man was seised in fee of a manor and other lands called Groves, and he made a feoffment of it (Groves being then in lease for years), and a letter of attorney to give livery, and the attorney made livery of the manor in the name of the rest, the lessee being still in possession of Groves; in this case it was agreed that this was no good feoffment for Groves.

Perk. sect. 228.

9 H. 7. 25. per Frowick.

Fitz. Faits and Feoffments, 2.

Montague v. Jefferies.

See infra.

4. In respect of the presence or possession of others.

When a feoffment is made of a house and land, the livery of seisin is most aptly to be made of and in the house, in the name of the rest, and at the door of the house, &c. And when a feoffment is made of a rectory or parsonage, the livery of seisin may be made in the parsonage-house; or, if there be no house, it may be made upon the glebe; or, if there be neither, it may be made at the ring of the church door.

In the making of every livery of seisin it is requisite that all persons that have any lawful estate and possession in the thing whereof livery is to be made, as lessees for

See before, Numb. 4.

(g) If a manor extends into two counties, livery in that part of the manor which is in one county, doth not pass that which is in the other county. So it is with respect to disseisin. *Hale's MSS.* But *Perkins* holds, that livery of parcel of such manor in one county will pass the parcel in the other county: *Perk. sect. 227.* However he admits that if one be disseised of two acres in different counties, entry into one acre in one of the counties though made in the name of both acres, will not extend to the acre in the other county. *Perk. sect. 229. note 2, to Co. Lit. 56. a. 13th edition.* See further in *Vin. Abr. Feoffment (D. a.) pl. 4.*

life

life, years, and such like, join in the making thereof, or be removed thence; for every livery ought to bring an immediate possession to the feoffee, donee, &c.

Dier 362.

If lessee for years make a feoffment and a warrant of attorney to give livery of seisin, and the attorney make livery of seisin, the lessor being present upon the land, and not contradicting it; it seems this is a good livery of seisin (r).

Bro. Feoffments, 24.

The presence of the feoffor, donor, &c. upon the land after he hath delivered seisin to the feoffee, donee, &c. albeit he stay upon the land a while, and do not depart and leave the feoffee, &c. in possession, will not hurt the livery. See more, *supra*, numb. 4.

* P. 214.

Co. super Lit. 49.

Livery of seisin may be made of any corporeal thing, as manors, houses, lands, meadows, pastures, woods, chambers, or the like. And these things, therefore, are said to lie in livery. But of incorporeal things, as rents, advowsons, commons, estovers, and such like things livery cannot be made. And these things, therefore, are said to lie in grant and not in livery. And therefore when a livery is made of these *nil operatur*. See more above, numb. 4.

5. In respect of the manner whereof it is to be made.

Co. 9. 137. super Lit. 49.

To every good livery of seisin is requisite either such an act as the law doth adjudge to be a livery, or apt words that do amount unto it, for a livery may be good by words without any act or deed at all; but it cannot be good by an act or deed without any words at all; howbeit that livery that hath an act or ceremony in it is the best, because it taketh the deepest impression in the witnesses.

6. In respect of the manner and order of making it: and how livery of seisin is to be made.

West. Symb. 1 part, sect. 251. Perk. sect. 209. & 110. Co. super Lit. 48.

The most usual, formal, and orderly manner of making of livery of seisin is thus; that the feoffor, donor, &c. and the feoffee, donee, &c. if they be present; or, in their absence, their attorneys or servants that have authority; do come to the door, backside, or garden, if it be a house, if not, then to some part of the land where seisin is to be delivered, and there, in the presence of many good witnesses, do shew the cause of their meeting, and openly and plainly do read the deed, or declare the contents thereof, and of the letter of attorney, if there be any. And then the feoffor, &c. or his attorney (if it be a house), do take the ring, latch, or hasp of the door (all the people, men, women, and children being out of the house), or (if it be of a piece of ground) do take a clod of the ground, or a bough or twig of a tree or bush growing thereupon; and (all the people being out of the ground) the same ring, &c. clod, bough, &c. with the deed do deliver to the feoffee, donee, &c. or to his attorney; and in the delivery thereof do use these or some such like words, *viz.* I deliver these to you in the name of seisin of all the lands and tenements contained in this deed, to have and to hold according to the form and effect of the same deed. Or, I deliver you seisin and possession of this house, or ground, in the name of all the lands contained in the deed, accord-

(r) See the text, *supra*, page 207, and note (u).

• P. 215.

ing to the form and effect of the deed (s). And then if it be a house, the feoffee, &c. doth enter in first alone, and shut the door, and then he doth open it, and let in others. And if the feoffment, gift, or lease be made without deed, then they do and must withal express the very estate itself which the feoffee, donee, or lessee is to have: as for example, the feoffor, donor, or lessor must come to the house, or land, which is to be granted, and where livery of seisin is to be made, and there must, by apt words, grant the house or land to him that is to have it, in fee-simple, or in tail, or for life (as the agreement is), and in seisin thereof must deliver him the ring of the door, or a turf or twig of the land. And if the feoffment, &c. be made by writing, then it is wisdom to indorse and set down on the back of the same, how, when, and where the same is made, and the names of the witnesses thereunto (t). But a livery of seisin that is not so exactly made, may be good notwithstanding. And therefore if the feoffor, donor, &c. or his attorney, take any thing else that comes from off the land, as a stone, or the like, and therewithal doth make the livery of seisin; or if he take a turf, or twig from off another man's ground, and not from the same whereof possession is to be given, and deliver that upon the ground in the name of seisin; or if he take a piece of silver or gold, or a rod, stick, or the like, and deliver this upon the land in the name of seisin; all these are good deliveries of seisin and possession. So if the feoffor, &c. be at the door of the house, or by the land, or in the house, or upon the land, and after he hath delivered the deed, he say to the feoffee, donee, &c. [Here I deliver you seisin and possession of this house, or land, in the name of seisin and possession of all the lands and tenements contained in the deed;] Or, [have and enjoy this house or land according to the deed;] Or, [enter into this land or house, and God give you joy of it;] Or, [I am content you shall enjoy this land;] in all these cases there is a good livery of seisin. *Et sic de similibus.*

If I being seised of a house in fee, make a feoffment of it and of divers lands, to a man then present with me in the same house, and there deliver him the deed in the name of seisin of all the lands contained in the deed; in this case, this is a good delivery of the deed, and a good livery of seisin also, albeit I continue in possession of the house still, and go not out of it. And if I be lord of a manor, and lying sick within some part of the manor, I make a feoffment of the manor, and deliver the deed to the feoffee, saying to him, I will that you take seisin presently; and

Co. 9. 137.
Fitz. Feoffments and Fairs, 111.

Co. 6. 26.
41 E. 3. 17.

Bro. Feoffments, 28.

Perk. sect.
211. 212.

(s) In the times of our Saxon ancestors, the delivery of a turf was a necessary solemnity to establish a conveyance of lands. Hicke's Dissert. Epistolar. 85. 2 Bl. Com. 312.

(t) Where there is no memorandum of the livery of seisin, and twenty years have elapsed since the making of it, and possession has gone according to the feoffment, there livery of seisin will be presumed. See *supra*, page 208, note (b). But if twenty years have not elapsed, and proof could not be adduced of livery of seisin having been actually made, the feoffment would be void as a feoffment, but it might possibly operate in some other way. But see *supra*, page 208, note (b), as to equity aiding defective feoffments.

thereupon

Perk. sect.
215. Co. 6: 26.

thereupon command all my tenants of the manor to attorn to him, and they do so; this is a good livery of seisin (u). So if I make a deed, and after I have read it, being upon the land, I deliver it to the feoffee, donee, &c. and say, here, I deliver you this charter as my deed in the name of seisin of all the lands therein contained, or the like; this is a good delivery of the deed and of seisin. But if I do only seal and deliver the deed upon or in view of the land, without saying or doing any more; this will not amount to a livery of seisin. And therefore if a man make a feoffment with a letter of attorney to give livery of seisin, and then he deliver the deed upon the land; this is no good making of livery of seisin. And so also if there be no letter of attorney.

Cromwell's
case, adjudged
in the Ex-
chequer, 15 El.

Co. 6. 26.

If I be seised of a house in fee, and being in the house say to *I. S.* here *I. S.* I demise you this house for term of my life; this* will not amount to a livery of seisin; and therefore it is no good lease until livery of seisin be made, but it is a good beginning of a lease (x).

* P. 216,

Perk. sect.
216.

If the father infeoff his son of land, and the son suffer his father to enjoy it, and after the son doth come to the parish church where the land doth lie, and there, in the audience of the parishioners, useth these words to his father, [father, you have given me such and such lands (and doth name them) as freely as you gave them to me I give them to you again;] this is no good livery of seisin, neither doth any estate pass hereby. So if one being upon his land say to *I. S.* [*I. S.* stand forth; I do here, reserving an estate to me for mine own life, give this land to thee and thy heirs for ever;] this is no good livery of seisin, neither doth any estate pass thereby (y). So if one make a charter of feoffment to me, and make no livery of seisin thereupon, and after I make a feoffment of the land to *I. S.* and the feoffor hearing and having notice of it, saith, [I do willingly agree to it, and am contented that *I. S.* shall have it;] or I do agree to the feoffment, or the like; in this case this doth not make the feoffment that was made to me good.

Hil. 37 Eliz.
B. R. Callard's
case.

Fitz. Faits and
Feoffments.

Co. super Lit.
48. Fitz. Es-
toppel, 177.

If divers parcels of land be conveyed, and livery of seisin is made in one; or there be divers feoffees, and livery of seisin is made to one of them according to the deed, without using any more words; this is good. But the best form and order of making of livery in this case is to add these words, [in the name of all the rest, &c.] (z).

Co. 9. 137. 6.
26. super Lit.
48. 233.

If the feoffor, donor, &c. deliver the deed in sight or view of the land, and use these or any such like words, [I will that you shall enter into the land and have it ac- view.

(u) Though attornment is rendered unnecessary by the act of the 4 Anne, c. 16, yet if a lessee paid rent to the lessor after he had conveyed away the reversion, but before he (the lessee) had any notice of the reversion being so conveyed, in such a case as this, it is presumed, the lessee would not be liable to pay his rent over again to the grantee of the reversion.

(x) A lease by *parol* cannot now be made for more than three years. See 29 Car. 2. c. 3.

(y) It is bad, as being an estate of freehold to commence *in futuro*.

(z) See more amply as to livery of seisin in deed, by whom, at what time, and in what manner it may be made, in Bac. Abr. Feoffment (A.) Vin. Abr. Feoffment (E.) (F.) Com. Dig. Feoffment (B.)

cording

cording to the deed;] or, [take and enjoy the land according to the deed;] or, [I deliver you this deed in the name of seisin;] or, [enter you into the land and take seisin of it;] or, [take the land and God give you joy of it;] or, (if the estate be made without deed) (a), [I give you yonder land to you and your heirs, and go and enter into the same, and take possession thereof accordingly;] or, [enter into the land and enjoy it in fee-simple to you and your heirs, or for your life, &c.] in all these cases the estate and the livery is good, albeit the feoffor, &c. stand in one county, and the land in view be in another county. But in all these cases of livery within the view. 1. It must be made by the person himself that doth make the estate, for it cannot be made by his attorney. 2. There must be a relation to the land, for if the feoffor do deliver the deed only to the feoffee in sight of the land; this is not a good livery within the view. 3. The parties must stand within view of the land, for if the feoffor, &c. being out of the sight of the land, say to the feoffee, &c. Go and enter, and take seisin of the land, and God send you joy of it; this is no good livery of seisin. 4. There must be some body capable of a freehold to take by the livery, for if it be made to a lessee for years, the remainder to the right heirs of I. S. and I. S. is then living, it is void. 5. The feoffee, &c. must enter presently, for if either the feoffor, donor, &c. or feoffee, donee, &c. die before entry; the livery cannot be made good (b). And yet if the party dare not enter for fear, in this case if he claim it only, and do not enter it is sufficient (c).

* P. 217.

10. Where livery of seisin made or taken by an attorney shall be good: and where not: and what warrant is sufficient.

Livery of seisin in deed may be made or taken by the deputies or attorneys of the parties, and this livery by them is as good as that livery of seisin which is made by the parties themselves; and that also as it seems albeit the parties themselves be upon the land at the time of the making thereof if they do not contradict it (d). But in the making of this livery care must be had, 1. That there be a deed of feoffment, for otherwise a letter of attorney to deliver possession availeth nothing. 2. That there be a good authority in writing, which may be either in the deed of feoffment itself, whether it be poll, or indented, and that albeit the attorney be not party to it, or else by a single deed besides the feoffment, &c. 3. That the attorney

1] New terms of the law. Co. super Lit. 48, Dier, 18.
2] 18 H. 6. 16.

3] Co. super Lit. 47.

5] Co. 1. 156. Perk. sect. 214. Fitz. Fairs and Feoffments, 49.

Co. super Lit. 52. Kelw. 51. Co. 9. 76. Terms of the law, tit. Livery.

The opinion therefore in Co. super Lit. 52. 6. as to this point, is held not to be law.

(a) There must now be a deed, or writing.

(b) The feoffee ought to enter and take possession presently, or the livery will not avail him; because a frank-tenement cannot be in abeyance. Mo. 85. It is said it will be good if the feoffee enters in the life of the feoffor, although the feoffee be a woman, and married before her entry to the feoffor, or to any other who enters and claims in right of his wife. *Parsons v. Parns*, 1 Mod. 91.

(c) For it will be a good execution of the livery and vest the frank-tenement in him. Co. Lit. 48 b. See further as to the perfection of livery within view, in Bac. Abr. Feoffment (A. 2.) Vin. Abr. Feoffment (L) and Com. Dig. Feoffment (B. 4.)—by what act livery within the view may be countermanded, see Vin. Abr. Feoffment (P. 2.)

(d) A man may either give or receive livery by his attorney. But a delegation or authority, for such a purpose, must be by deed, that it may appear to the Court, that the attorney had a commission to represent the parties that are to give or take livery, and whether the authority was pursued. Bac. Abr. Feoffment (E.)

do

do pursue his authority at least in the substance and effect of it. 4. That the attorney do it in the name of the feoffor, donor, &c. who doth give the authority. 5. That it be done in the life-time of the parties. But a livery in law may not be made by an attorney. And therefore if a letter of attorney be to deliver seisin generally, and the attorney by virtue thereof deliver seisin in view; this livery of seisin is void (e).

Bro. Feoff-
ments, 25.
Ass. pl. 4.
Perk. sect. 23.

If an infant, or woman covert, make a feoffment and letter of attorney to make livery, and the attorney do so; this is void, for they are not able to give such an authority (f). Infant.
Woman co-
vert.

And if a man whilst he is of sound memory, make a feoffment with a letter of attorney to give livery, and after he become paralytic and so dumb, but by signs he doth declare himself to be willing to have livery of seisin made, and it is made; this is a good livery of seisin. But if a letter of attorney be made to deliver seisin of certain land by one that is *non sana memorie*, and the deed of feoffment was made whilst he was of sound memory, and afterwards he doth come to his memory again, and then the livery is made upon the first warrant without any new assent, &c. in this case the livery is not good.

*Non sana me-
morie.*

Dier, 283.

That for the most part, which for the manner and order of making it is a good livery of seisin if it be made and taken by the parties themselves, is good, being made and taken by their attorneys or deputies that have a good authority and do well pursue it. And therefore if the conveyance be made of divers lands, and they lie in one county, and a warrant of attorney is made to give livery generally, and the attorney doth make it in one part of the land in the name of all the rest; this is a good livery. *Et sic de similibus.*

Co. super Lit.
52.

If a man be seised of Black Acre and White Acre, and he make a deed of feoffment of both these acres, and a letter of attorney to enter into both these acres, and to deliver seisin of both of them according to the form and effect of the deed, and he doth enter into Black Acre, and deliver seisin *secundum formam chartæ*; in this case, the livery of seisin is good, albeit he doth not enter into both the acres, nor into one acre in the name of both. And if the feoffment be made to two or more, and the warrant of attorney is to make livery to them both, and the attorney doth make livery of seisin to one of the feoffees *secundum formam & effectum chartæ*; in this case the livery is good to both, and yet he that is absent may waive the livery.

P. 218.

And yet if a man be disseised of Black Acre and White Acre, and a warrant of attorney is made to one to enter into both these acres, and to make livery, and the attorney doth enter into one acre only, and make livery of seisin there *secundum formam chartæ*; in this case the livery of

Co. super Lit.
52. 358. Perk.
sect. 187, 188,
189.

(e) An attorney cannot make a letter of attorney to another to give livery, (18 Elix. 4. 12 b. 19 H. 8. 10. 2 Rol. Abr. 9, Noy's Max. 161), unless he has an express power to do so, in which case it is conceived he may.

(f) Though an infant by the custom of gavelkind may make a feoffment, yet the livery must be made *propria manu*. See Robinson on Gavelkind.

seisin is void for all, for in this case he doth less than his authority. So if a man make a letter of attorney to deliver seisin to *I. S.* upon condition, and the attorney doth deliver seisin absolutely; this livery of seisin is void. And so in all such like cases where the attorney doth less than the authority and commandment, all that he doth is void. But for the most part where the attorney doth that which he is authorised to do, and more also, it is good for so much as is warranted, and void for the rest. And therefore if the letter of attorney be to give livery of seisin to *I. S.* and the attorney give it to *I. S.* and *W. S.* this livery is good to *I. S.* and void to *W. S.* So if the letter of attorney be to give livery of seisin of White Acre only, and he make livery of White Acre and White Acre also; this livery is good for White Acre, and void for Black Acre. So if the letter of attorney be absolute, and the attorney give livery upon condition; some hold this to be good, and the condition to be void.

Perk. sect.
109.

Co. super Lit.
258.

If a letter of attorney be made to two jointly, to make or take livery of seisin, and one of them alone doth it without the other; this is a void livery. But otherwise it is when it is made to two jointly or severally, for there one of them alone may do it (*g*).

Co. super Lit.
49.

If a letter of attorney be to make livery of seisin after the death of another man, and the attorney doth make livery of seisin during that man's life; this livery is void (*h*).

Perk. sect. 39.

11. How it shall enure, and be taken and construed.

Livery of seisin is sometimes made single, and without any relation to the deed, whereby the estate upon which the livery is made, is created, at all: and sometimes, and most commonly, it is made with reference to the deed in these, or such like words, [*secundum formam chartæ*]. In the first case the estate is oftentimes made upon the livery; and then there may be one estate contained in the deed, and another made by the livery; also there may pass more land by the livery than is in the deed, and by this means when there is a fault in the deed, so that the land will not pass by the deed, it may perhaps pass by the livery (*i*): but in this case then there must be apt words used in the making of the livery to create the estate also, as well as to give the possession. But where the livery of seisin is made with relation to the deed, there it must take effect according to the deed or not at all; for these words *secundum formam chartæ*, are to be understood according to the quantity and quality of the effectual estate contained in the deed. And therefore if one make a deed of feoffment to another, and in the deed there is contained no condition at all, and when the feoffor doth make livery he doth

Lit. sect. 359.
Co. super Lit.
48. 122. Fitz.
Estoppel, 177.
17 Ed. 4. 25.
Co. super Lit.
49. Fitz. Feo-
ffments and
Fails, 25.

* P. 219.

(*g*) If a letter of attorney be made to three *conjunctim et divisim*, and two of them only make the livery, it is not good, because not pursuant to the authority; for the delegation was to them all three, or to each of them separately; but if the third was present at the time of the livery, though without doing or saying any thing, it is good. Dier, 62 a. see further Mo. 278. 1 Leon. 192.

(*h*) See more amply as to the doctrine of livery by letter of attorney, in Vin. Abr. Feoffment (Q.) Com. Dig. Feoffment (B. 3.)—and note (*g*) to the 13th edition Co. Lit. 52 a.

(*i*) Since the Statute of Frauds no estate can be created by livery without writing, and therefore nothing could now pass by the livery which is not in the deed.

make

make livery upon condition; or if the deed contain an estate to him and his heirs, and he maketh livery of an estate in tail or for life; in these cases there doth pass nothing by the deed. And yet if there be apt words used to create such an estate at the time of the livery made; such an estate may be made by the livery without the deed (k), and then the deed shall be void. But if in these cases the feoffor say, when he doth make livery on condition in tail, or for life, *secundum formam chartæ*; in this case there is a good feoffment made according to the deed, and the additional words are void. So if a man make a lease for years, and make livery *secundum formam chartæ*; this is but a lease for years still. And if A. give land to B. to have and to hold after the death of A. to B. and his heirs; this is a void deed (l); and therefore if the livery of seisin be made *secundum formam chartæ*, the livery of seisin is void also. But if when he doth give livery of seisin, he give it to him and his heirs without these words *secundum formam*, &c. or if in the making of livery he say, here, I deliver you seisin of this land, to have and to hold to you and your heirs for ever, or the like; this may make a fee-simple (m). And so if one make a deed of feoffment of two acres, and after make livery of seisin of four acres: in this case if there be words in the livery of seisin sufficient to make a new estate, the other two acres may pass also (n).

Co. 2. 35. 5.
94. and Green-
wood's case,
B. R. Mich-
17 Jac.

If A. by deed give land to B. to have and to hold after the death of A. to B. and his heirs; this is a void deed (o); and therefore if upon this deed, livery of seisin be made before the day, by the party himself, or at, or after the day by his attorney *secundum formam & effectum chartæ*; the livery is void also, for it cannot enure so. And yet if a lease be made for life to begin in *future*, and at, or after the day come, the lessor himself in person doth make livery of seisin *secundum formam chartæ*; in this case the lease perhaps may become good by this livery of seisin.

Co. super Lit.
222.

If an agreement be between two that the one shall in-feoff the * other upon condition for surety of money, and afterwards livery of seisin is made generally without any such condition; in this case it is said by some, the estate shall be on condition still (p).

* P. 220;

Perk. sect.
42.

If there be a fault in the deed, as by the mis-naming of the feoffor, &c. feoffee, &c. or the like, and afterwards the feoffor, &c. doth himself in person make livery of sei-

(k) See the last note.

(l) According to the principles of the common law an estate of freehold cannot be made to commence in *future*, except as a remainder expectant upon some prior estate of freehold. If a feoffment was made to B. and his heirs, to the use of A. for life, remainder to B. in fee; here the estate of B. would not be open to the objection of being made to commence in *future* and without a prior estate of freehold to support it, (as in the case put in the text), and would therefore be good.

(m) The livery, as a livery without a writing, would be void. See Statute of Frauds, 29 Car. 2. c. 3.

(n) As there is no writing relating to the other two acres they could not pass.

(o) See *supra*, note (l).

(p) If the condition is contained in the charter of feoffment, and the livery is made without saying *secundum formam chartæ*; yet since a writing is now necessary, the livery, it is presumed, would be considered as having relation to the charter of feoffment, and consequently the estate would be considered as subject to the condition.

sein upon this deed to the feoffee, &c. by this the fault of the deed may be holpen and cured (g).

If one make a feoffment to himself and another, and give livery of seisin to the other; this is a good feoffment, and shall enure to the other wholly, and he shall take the whole by the feoffment and the livery. And so if the livery be made to one that is capable, and to another that is not capable; he that is capable shall take the whole, and the other shall have nothing. So if a feoffment be made to two, and one of them die before the livery is made, and after the livery is made to the survivor; in this case the livery shall enure to the survivor only, and he shall have all the estate thereby. So if a feoffment be made without deed (r), to a corporation and to I. S. and livery is made to I. S. alone, in this case I. S. shall have the whole and the corporation nothing at all.

Perk. sect.
204, 203.
7 H. 7. 9.

If a feoffment be made to four, and livery of seisin is made to one, two, or three of them; this shall enure to them all. But if the feoffment be without deed (s), it shall enure to him wholly to whom the livery is made. And if one of them give warrant to the rest to take livery for him, and they do so; this shall enure to them wholly, and not to him at all for any part.

Dier, 35.
10 E. 4. 1.
Co. 5. 93.

If the tenant make a feoffment to his lord and another, and give livery of seisin to the other; this shall enure wholly to the other until the lord agree to it, and then to them both.

10 E. 4. 12.

If one make a deed of feoffment of one acre of land to A. and his heirs, and another deed of the same land to A. and his heirs of his body; and deliver seisin according to the form and effect of both deeds; in this case it shall enure by moieties, i. e. he shall have an estate tail, and the fee-simple expectant in the moiety, and a fee-simple in the other moiety.

Co. super Lit.
21.

If two several deeds of feoffment be made to two several persons of one and the same thing; he that can get the seisin first shall have it (t). *Rem domino, vel non domino, vendente duobus, in jure est potior traditio prior.*

If lessee for life make a feoffment, and a letter of attorney to the lessor to make livery, and he doth make livery accordingly; in this case this shall not enure to bar him of his entry upon the feoffee for the forfeiture of his lessee. But if lessee for years make a feoffment in fee, and such a letter of attorney to the lessor, and he doth deliver seisin accordingly; this livery shall bind him, for it shall be said as in his own right, because the lessee had no freehold whereof to make livery.

Co. super Lit.
52.

(g) Since the deed is now essential to the transfer of the estate, it is conceived that any misnomer, or other error, which would affect the validity of any other species of conveyance, would equally affect a conveyance by feoffment.

(r) Cannot now be made without deed. See Statute of Frauds, 29 Car. 2. c. 3.

(s) Cannot be done. See 29 Car. 2. c. 3.

(t) But if the other feoffment was made first, and for a valuable consideration, and the second feoffee had notice of it, although by the livery he would acquire the legal estate, yet a Court of Equity would compel him to convey the estate to the party to whom the first feoffment was made.

Co. super Lit.
52. If a lessor make a deed of feoffment, and a letter of attorney to the lessee for years to give livery, and he doth it accordingly; this shall not be construed to extinguish or hurt his term (u). See more in *Exposition of Deeds, supra*, ch. 5.

And so we come to another kind of deed of common assurance, called a *Bargain and Sale*.

(u) Mr. *Hargrave*, in note (S) to the 13th edition *Coke Littleton*, 48 a. observes, "That since the introduction of uses and trusts, and the statute of 27 H. 8, for transferring the possession to the use, the necessity of livery of seisin for passing a freehold in corporeal hereditaments has been almost wholly superseded, and in consequence of it the conveyance by feoffment is now very little in use." The limited use, therefore, of this species of conveyance, renders the doctrine relative to it of the less importance, and consequently the less necessary to enter more fully into it. In speaking, in the above note, of the Statute of Uses, Mr. *Hargrave* observes, "Those who framed the statute of Uses evidently foresaw, that it would render livery unnecessary to the passing of freehold, and that a freehold of such things as do not lie in grant would become transferrable by *parol* only without any solemnity whatever. To prevent the inconveniences which might arise from a mode of conveyance so uncertain in the proof, and so liable to misconstruction and abuse, it was enacted in the same session of parliament, that an estate of freehold should not pass by bargain and sale only, unless it was by indenture enrolled. See 27 H. 8. c. 16. The objects of this provision evidently were, first, to force the contracting parties to ascertain the terms of the conveyance by reducing it into writing; secondly, to make the proof of it easy by requiring their seals to it, and consequently the presence of a witness; and lastly, to prevent the frauds of secret conveyances by substituting the more effectual notoriety of enrolment for the more ancient one of livery. But the latter part of this provision, which if had not been evaded would have introduced almost an universal register of conveyances of the freehold in the case of corporeal hereditaments, was soon defeated by the invention of the conveyance by lease and release, which sprung from omitting to extend the statute to bargains and sales for terms of years; and the other parts of the statute were necessarily ineffectual in our Courts of Equity, because these were still left at liberty to compel the execution of trusts of the freehold though created without deed or writing. The conveyances from this insufficiency of the statute of enrolments are now in some measure prevented by the 29 Car. 2. c. 3. which provides against conveying any lands or hereditaments for more than three years, or declaring trusts on them, otherwise than by writing. See further as to the nature and operation of the conveyance by lease and release, in the case of *Barker v. Keut*, 2 Mod. 249. *Shortridge v. Lamplugh*, Ld. Raym. 798. *Lilley's Pract. Convey.* 227. *Bac. Abr. Release* (C. 4.) *Zouch v. Parsons*, 5 Burr. 1794. *Vin. Abr. Deeds* (D.)"

CHAP. X.

OF A BARGAIN AND SALE (a).

1. Bargain and sale.
Quid.

THIS word doth signify the transferring of the property of a thing from one to another, upon valuable consideration. And herein only it doth differ from a gift; that this may be without any consideration or cause at all, and that hath always some meritorious cause moving it, and cannot be without it (b). This word also is sometimes applied to the assurance or conveyance whereby this is done and made, which is called a deed of bargain and sale, for this may be done by writing or without writing (c).

Terms of the law.
Plow. 301.
Co. 2. 35.

2. Quotuplex.

And sometimes this is and may be of lands, tenements, and hereditaments, and to this the term is most properly applied. And then it is said to be, where a recompence is given by both parties to the bargain. As where one doth bargain and sell his land to another for money; in this case the land is a recompence to the one for the money, and the money to the other for the land. And this now also is become one of the common assurances of the kingdom; so that such an assurance may now be averred to be fraudulent within the statute of 27 Eliz. as well as any other assurance, a rent may be reserved upon it, or a condition made by it, as well as by any other kind of assurance. And sometimes this is and may be of moveable things, as trees, corn, grass, oxen, kine, household-stuff, and the like: the property whereof is and may be altered by this kind of conveyances, as well as by gift, or grant (d).

Terms of the law.
Plow. 301.
Co. 2. 35.

Per Chief Just. Hide,
3 Car.
Co. 2. 54.

(a) A bargain and sale, in its present form, is a species of conveyance which may be considered to have arisen out of the statute of Uses and the act of the 27 Hen. 8. c. 16. It may not be improper to explain the principle upon which it is founded. Where a person for a valuable consideration in money contracted to sell (or bargained and sold) his lands to another, he was considered in equity as seised to the use of the bargainee. The statute of Uses having declared that he who had the use should have the legal estate and possession, and the bargainor being seised to the use of the bargainee, the latter, by force of the statute, immediately acquired the legal estate. As a mere contract (or bargain and sale), for the purchase of lands, might, at the time of making the statute of Uses, have been entered into by parol, persons would have been enabled, by the joint operation of such contracts and the statute, to have made conveyances of their estates without livery, writing, or any other solemnity; by which the great object of the statute itself would have been defeated. To obviate therefore the bad consequences which would have arisen from such a mode of transferring property, an act was passed in the same session with the statute of Uses, (viz. the act of the 27 Hen. 8. c. 16.) which enacts that no estate of freehold in any manors, lands, &c. shall pass by bargain and sale, except such bargain and sale is made by writing indented, sealed, and enrolled in one of the courts of record at Westminster, or within the county where the lands lie, before the *custos rotulorum*, and two justices and the clerk of the peace, or two of them at least, (the clerk of the peace to be one) within six months after the date of such bargain and sale.

(b) Though money is the usual consideration for a bargain and sale, yet it is not absolutely necessary to the validity of a bargain and sale that there should be an actual pecuniary consideration. There must however be a consideration possessed of pecuniary value, otherwise an instrument relating to real property, cannot operate as a bargain and sale. But if the consideration has pecuniary value, though to ever so small an amount, it is sufficient; and therefore a barley corn is held to be a consideration which will raise a use.

(c) Where the bargain and sale relates to an estate of freehold, a deed (an indenture) is necessary by the act of the 27 Hen. 8. c. 16. And by the statute of Frauds, 29 Car. 2. c. 3. where the bargain and sale even relates to a chattel interest in lands a writing is necessary.

(d) When made of mere personal chattels, it is more commonly called a *bill of sale*, and requires no enrolment under the act of the 27 Hen. 8. c. 16.

And

Terms of the
law.
Agreement.

And this kind of bargain and sale is that which is commonly called a contract: which, largely taken, is an agreement between two or more concerning something to be done, whereby both parties are bound to each other, or one is bound to the other. But strictly, it is the buying and selling of some personal goods whereby the property is altered. And in both these cases he that doth sell is called the bargainor, and he to whom the sale is made is called the bargainee.

Bargainor.
Bargainee.

Co. 8. 94. 5.
113. 3. 62.

The effect of this is to transfer the property; and this it will as effectually do as any other kind of conveyance whatsoever. And therefore the bargainee of a reversion, howsoever he may not have *benefit of a condition upon the demand of a rent without giving notice of the bargain and sale to the lessee; and howsoever if *A.* conusee by a fine of a reversion, before attornment of the tenant bargain and sell the reversion to *B.* that *B.* cannot distrain for this rent until he can get an attornment of the tenant (*e*); yet the bargainee shall have benefit of a condition as an assignee within the statute of 32 *H.* 8. And it seems he may vouch by force of a warranty annexed to the estate of the land, because he is in partly in the *per*, and partly in the *post* (*f*).

3. The effect
of it.

• P. 222.

See West.
Symb. tit.
Bargain and
Sale.

All things for the most part, that are grantable by any other way from one man to another, are grantable and may be transferred by way of bargain and sale from one to another. And therefore lands, rents, advowsons, commons, tithes, profits of courts, and the like, may be granted by way of bargain and sale in fee-simple, fee-tail, for life, or years. And all manner of goods and chattels, as leases for years, wardships, cattle, corn, household-stuff, wood, trees, merchandizes, and the like, are grantable by way of bargain and sale (*g*). But it seems estovers, and such like things *de novo*, and that have not essence before, are not grantable by way of bargain and sale, as they are by way of grant or lease, and therefore that a bargain and sale of such things is void (*h*).

4. Of what
things a bar-
gain and sale
may be or not.

6 Jac. B. R.
Adjudged
21 H. 6. 43.
per Yelverton.

Stat. 27 H. 8.
c. 16.

If any estate of freehold or inheritance be made of land by way of bargain and sale, the same must be made by a writing or deed indented (*i*), and cannot be made by word

5. What shall
be said a good
bargain and

(*e*) Attornment is now rendered unnecessary by the act of the 4 *Ann.* c. 16. s. 9.

(*f*) A bargain and sale is not so strong a conveyance as a feoffment; for if I have a rent-charge in the right of my wife out of the manor of *D.* and I purchase the manor, and afterwards by deed indented and inrolled I bargain and sell the manor, the rent-charge shall not pass. 1 *Leon.* 6. By feoffment or fine all uses and possibilities are conveyed by reason of the forceable operation of a feoffment or fine, but it is otherwise by bargain and sale. See 1 *Leon.* 33.—In short, a bargain and sale is an innocent conveyance, and passes no more than what the bargainor may lawfully convey. A bargain and sale does not pass away nor affect a contingent use in the bargainor; but a feoffment or fine would transfer it. *Hardr.* 416. See more amply as to the operation of a bargain and sale, 2 *Wood.* 651. *Com. Dig.* Bargain and Sale (B. 3). 2 *Bl. Com.* 338. *Vin. Abr.* Deeds (A).

(*g*) As to bargains and sales of goods and chattels, see *Com. Dig.* Bargain and Sale (A). *Biens*, (D. 3). *Grants* (C).

(*h*) *A.* by indenture enrolled, bargains and sells to *B.* in fee, with a way over other lands of *A.*,—the deed was held to be void as to the way, for nothing but the use passed by the deed, and there cannot be an use of a thing which is not in *esse*, as a way, common, &c. which are newly created; and until they are created, no use can be raised by bargain and sale. *Cro. Jac.* 189. See further what may be bargained and sold, *Bac. Abr.* Bargain and Sale (B). *Com. Dig.* Bargain and Sale (B). *Vin. Abr.* Bargain and Sale (G).

(*i*) It must be written and not be printed; and it must be written on parchment or paper, and not upon wood, stone, lead, or other material. 2 *Inst.* 672.

of

sale: and what things are requisite to make such a bargain and sale: or not.

Of lands.

of mouth only, as a lease for years (*k*), whether it be created *de novo*, or be in *esse* before, may be. But lands in London by a special proviso within the statute may be bargained and sold by word of mouth without any writing (*l*).
 2. The very words bargain and sell, are not necessary to a good bargain and sale; for words equivalent will suffice to make land pass by way of bargain and sale. And therefore if a man seised of land in fee, do by deed indented, and by the words alien or grant, sell them to another; or if such a man covenant to stand seised of his land to the use of another; and these deeds are made in consideration of money, and the deeds be after enrolled; these will amount to good bargains and sales. And if a man by a deed indented and enrolled in consideration of ten pounds paid to him, by the words, demise and grant, pass his lands to another for twenty-years; this is a good bargain and sale (*m*).
 3. There must be some good consideration given, or at least said to be given for the land. And therefore if *A.* (for divers good considerations) ^a or (in consideration that the bargainee is bound for the bargainor, and for divers other good causes) ^b or (for divers great and valuable considerations) bargain and sell his land by deed indented and inrolled to *B.* and his heirs; *nihil operatur*. But if in these cases in truth there be money or other good consideration given, albeit it be not expressed upon the deed ^c the bargainee may aver it, and being proved, the bargain will be good. And if the deed make mention of money paid, as in consideration of an hundred pounds, or the like, and in truth no money is paid, yet the bargain and sale is good. And no averment will lie against this which is expressly affirmed by the deed. And if the deed mention and say (for a certain sum of money) or (for a certain competent sum of money) these are good considerations (*n*).
 4. There needs no livery of seisin or attornment in this case. And therefore if one bargain and sell a reversion by deed indented and inrolled, for good consideration; the reversion will pass without any attornment of the tenant. And if it be only a lease for years of a reversion that is granted there needs no attornment nor inrolment. And in case of a bargain and sale, the bargainee is in actual possession before any entry, so that the lessee may attorn to the grant of the reversion, as hath been ruled in *Mitton's case*, *Mich.*

Co. 8. 94. 7.
40. 2. 36.

Co. 1. 176.

^a Ward v. Lambert, Pasch. 37 Eliz. 41 El. Adjudged. Dier, 169.

^c P. 223.
Averment.

Dier, 90.

Co. 7. 40.
8. 94.

(*k*) A lease for years, (except where it does not exceed three years) must now be in writing. See statute of Frauds, 29 Car. 2. c. 3.

(*l*) Lands in the city of London are exempted out of the statute 27 H. 8. c. 16, and before the statute of Frauds might have been conveyed by bargain and sale without deed; but since this statute a warranty at least is necessary to the validity of bargain and sale of such lands, where more than an estate for three years passes.

(*m*) See accordingly the words *demise* and *grant* adjudged a good bargain and sale without other words. 1 Vent. 141. See also *Taylor v. Vale*, Cro. Eliz. 166. and Cro. Jac. 210. But though the words *bargain and sale* are acknowledged by Lord Coke not to be absolutely necessary, yet he says it is good to make use of them, they being contained in the act. 2 Inst. 672. Where an instrument cannot operate as a bargain and sale, either from the want of enrolment or otherwise, it may possibly still have effect as a covenant to stand seised of a grant of a reversion, or as feoffment, if livery is given.

(*n*) If the deed expresses for a competent sum of money, though the certainty of the sum be not mentioned, it is good enough; for against this express mention in the deed no averment nor evidence shall be admitted. *Fisher v. Smith*, Mo. 569; and even if no pecuniary consideration is expressed in the deed, yet if one was actually paid, the payment may be averred, and this will be sufficient. See 1 Co. 176. a. and see more amply what shall be a sufficient consideration, in Com. Dig. Bargain and Sale (B. 11.) Bac. Abr. Bargain and Sale (D). and see *supra*, page 231, note (b).

Co. 5. 112.

Stat. 27 H. 8.
c. 16. pl. 307.

18 *Jac. in Cur' Ward*, by the two Chief Justices and the whole court (o). And yet I think he hath not such a possession as to bring any possessory action for trespass, or the like, until an actual entry; for where the statute of 27 H. 8. of Uses, provides, that the actual possession shall be adjudged according to the use, yet it ought to have a circumstance which is requisite by the common law, viz. an actual entry in deed. But there must be an enrolment of the deed in case where any freehold doth pass (p), for it is provided, that no lands (except in some corporations only) shall pass from one to another by any deed whereby any estate of inheritance or freehold shall be made, or take effect in any person or persons, by reason only of any bargain and sale thereof, except the same be made and done by writing indented, sealed and inrolled in one of the four courts [the Chancery, King's Bench, Common Pleas, or Exchequer, or else within the same county or counties where the lands so bargained and sold, do lie, before the *custos rotulorum*, and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one (q). And the same enrolment to be within

Enrolment,
where necessary: and how it must be done.

(o) See 4 Ann. c. 16. on the subject of attornment.

(p) And until the enrolment the *lands remain in the bargainor*; for a bargain and sale on the statute 27 H. 8. c. 16, is *imperfect*, and gives nothing to the bargainee till the deed is enrolled according to the statute. Vin. Abr. Deeds (N). But as soon as the deed is enrolled, the bargainee is considered as seized from the date of the bargain and sale, [it is otherwise in the case of an indenture (commonly called a bargain and sale) made by commissioners of a bankrupt's estate: But the doctrine relative to such bargains and sales will be more fully noticed at the end of the chapter.] If the bargainor or bargainee dies before enrolment, yet if the deed is afterwards enrolled within the time prescribed by the act, the lands will pass. Wood's Inst. 259. and 2 Inst. 674.

(q) By the statute 5 Eliz. c. 26, bargains and sales may be enrolled in the counties palatine of *Lancaster*, *Chester*, and the bishoprick of *Durham*, of manors, lands, &c. within the county of *Lancaster*, the county of *Chester*, or the county of the bishoprick of *Durham* respectively.—By 5 Ann. c. 18, bargains and sales of any manors, lands, &c. within the *West-riding* of the county of *York*, which shall be enrolled before the register for the said *West-riding*, or his deputy for the time being, in the public office at *Wakefield*, shall be as good and available, as if the same had been enrolled in one of the king's courts of record at *Westminster*, or before the *custos rotulorum*, and two justices of the peace, and the clerk of the peace of the said *West-riding*, or two of them, according to the act of the 27 H. 8.—By the 6 Ann. c. 35. s. 16, the like proviso is made for inrolling bargains and sales in *Beverley*, of lands within the *East-riding* of the county of *York*, or the town and county of the town of *Kingston upon Hull*; and by the 30th sect. of that stat. it is enacted, "That in all deeds of bargain and sale inrolled in pursuance of that act, whereby any estate of inheritance in fee simple is limited to the bargainee and his heirs, the words *grant, bargain and sell*, shall amount to, and be construed and adjudged in all courts of judicature, to be express covenants to the bargainee, his heirs and assigns, from the bargainor for himself, his heirs, executors, and administrators, that the bargainor, notwithstanding any act done by him, was at the time of execution of such deed seized of the hereditaments and premises thereby granted, bargained and sold, of an indefeasible estate in fee simple, free from all incumbrances (rents and services due to the lord of the fee only excepted) and for quiet enjoyment thereof against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance thereof to be made by the bargainor, his heirs and assigns, and all claiming under him; unless the same shall be restrained and limited by express particular words contained in such deed; and that the bargainee, his heirs, executors, administrators and assigns respectively, shall and may, in any action to be brought, assign a breach or breaches thereupon, as they might do in case such covenants were expressly inserted in such bargain and sale."—By the 8 Geo. 2. c. 6. s. 21. the enrolment of bargain and sales of lands in the *North-riding* of the county of *York* is authorised in the register office for that Riding.—By the 33 Geo. 2. c. 30. s. 10. (being an act for widening certain streets, &c. in *London*.) it is enacted, that all bargains and sales made and acknowledged by any person or persons whomsoever, and which shall be enrolled in the *hustings* of the said city, of any lands, tenements, and hereditaments, purchased by virtue of, and for the purposes of that act, shall have the force, effect, and operation in law, to all intents and purposes, which any fine or fines, recovery or recoveries whatsoever, would have, if levied or suffered by the bargainor or bargainors, or any person or persons seized of an estate in the premises, in trust for, or to the use of, such bargainor or bargainors, in any legal manner or form whatsoever.

six months next after the same writing or deed is dated. And this statute was made in the same parliament wherein the law of transferring of uses into possession was made, to the end that men's lands might not suddenly and privately pass upon payment of a little money in an alehouse, or the like. And herein these things must be observed.

1. The enrolment upon such a deed as to make the estate to pass, must be in parchment; for an enrolment in paper is not good (r). 2. The deed enrolled must be indented; for if it be but poll, the estate will not pass. 3. It must be enrolled within six months of the purchase or sale. And this account must be. 1. From the date, and not from the time of the delivery of the deed. 2. After twenty-eight days to the month and no more (s). 3. The day of the date to be taken exclusive, and for none of the days of the six months. And yet if a deed be enrolled the same day it bears date, it is good. 4. If it be enrolled any part of the last day of the six months, it is sufficient. And thus the deed may be enrolled within the six months, albeit either of the parties die within the time. And if the deed be not thus enrolled, it is of no force at all (t). So that if one bargain and sell his land to me, and the trees upon it; in this case, albeit the trees might have been sold alone by deed without enrolment, yet now being not enrolled, because the sale is not good for the land, it shall not be good for the trees also. And no subsequent act will help in this case: for if one by words of bargain and sale only, without any other words in the deed, grant a reversion, and the deed be not enrolled, and after the tenant doth attorn; hereby nothing doth pass, neither shall it enure as a confirmation. But yet this must be noted, that in some cases, where a deed will not enure by way of bargain and sale for some of the causes aforesaid, it may enure to some other purposes. A bargain and sale may be made of goods and chattels, without any such solemnity as before; for it may be by word as well as by writing, with or without any words of bargain and sale, as well as by those words; by a deed poll, as well as by a deed indented; and that without any enrolment at all, and without any delivery of any part of the things sold, or of any piece of money, (as the manner is) in the name of seisin. But in this case also some respect is to be had unto the cause and consideration of the bargain, as well as in the case of the bargain and sale of lands. For howsoever perhaps in the case of a grant, or bargain and sale, of goods or chattels, by deed

Co. 5. 1.

2) Dier, 216.
Adjudged
Franklin &
Garter's case,
Mich. 37 & 38
Eliz.4) Dier, 218.
Ruled in the
Court of
Wards.
Co. 11. 48.Of goods and
chattels.

Experientia.

Plow. 308.

(r) And by the 10 Ann. c. 18. s. 3. a copy of the enrolment of a bargain and sale, examined with the enrolment, and signed by the proper officer, having the custody of such enrolment, and proved upon oath to be a true copy so examined and signed, shall, in all cases where a bargain and sale shall be pleaded with a *proferri in curia*, be of the same force and effect as the indenture of bargain and sale would be if the same was produced.

(s) See accordingly, 2 Inst. 274.

(t) See further on the subject of enrolment, *supra*, page 223. It may be proper to observe, that although a bargain and sale is duly enrolled, yet it is not effectual if the bargainor had any legal disability; as infancy, &c. and if an infant bargains and sells lands by deed indented and enrolled, he may avoid it when he will.

Dier, 29, 30.
14 H. 8. 19.
9 H. 7. 21.
21 H. 7. 6.
10 H. 7. 6.
Plow. 432.

in writing, the consideration is not material. And that if a man do by his deed under his hand and seal, bargain and sell timber trees, or any other thing, without any consideration at all, the same may pass well enough; yet if the contract be by word, or by writing sealed and not delivered, if there be no consideration or no good consideration of it, it is of no effect at all. And therefore if a man by word of mouth sell to me his horse, or any other thing, and I give him or promise him nothing for it; this is void and will not alter the property of the thing sold. But if one sell me a horse, or any other thing, for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or all, or part of the money is paid in hand; or I give earnest money (albeit it be but a penny) to the seller; or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment; in all these cases there is a good bargain and sale of the thing to alter the * property thereof: and in the first case I may have an action for the thing, and the seller for his money; in the second case I may sue for and recover the thing bought; in the third I may sue for the thing bought, and the seller for the residue of the money; in the fourth case where earnest is given we may have reciprocal remedies one against another; and in the last case the seller may sue for his money. If *A.* sell cloth to *B.* for ten shillings, and *B.* takes away the cloth against the will of *A.*, in this case *A.* shall have an action of trespass against *B.* And if *A.* sell cloth to *B.* for ten shillings in his election to make it a bargain or not, and if he will he may keep his cloth until the other pay him, and if *A.* say nothing, but doth suffer *B.* to take it away; he may make it a bargain if he will, and bring an action of debt for his money. If I offer money for a thing in a market or fair, and the seller agree to take my offer, and whilst I am telling the money as fast as I can, he doth sell the thing to another; or when I have bought it, we agree that he shall keep it until I can go home to my house to fetch the money; in both these cases, especially in the first, the bargains are good, so as the seller may not sell them afterwards to another, and upon the payment or tender and refusal of the money agreed upon, I may take or recover the things.

Co. 1. 87.
super Lit. 10
Dier, 169.

If one do bargain and sell his land to me for money, to have and to hold to me generally, and doth not say to me and my heirs; by this I have but an estate for life and no more.

6. How a bargain and sale shall be taken.

Pier, 155.

If one, in consideration of ten pounds paid by me, doth bargain and sell his land to me and my heirs, to have and to hold to me to the use of the bargainor for life, the remainder in tail to me, the remainder to the right heirs of the bargainor; this *habendum* in this case is void, and I and my heirs shall have the land for ever (*).

Of lands.

If

(*) No use can arise upon a bargain and sale in favor of any other person than the person or persons from whom the consideration moves. But though no use, that is, no estate at law could arise in favor of

Of goods.

. If one, in consideration of ten pounds, sell me land for the term of twenty years, and doth not say when this term shall begin; in this case it shall begin presently (x). See more in *Exposition of Deeds*, c. 5, in toto (y). Co. 6. 33.

If one sell me any thing by the tod, pound, bushel, yard, or ell; it shall be accounted me assured, and reckoned according to the custom of the country and place, and not according to the statutes or the measures of other countries. Keiw. 87. Plow. 140. 41.

If one sell me twenty barrels of ale, or ten pottles or cups of wine; by these bargains I shall not have the barrels, pottles, or cups, with the ale or the wine. But if one sell me a hogshead, or a firkin of wine, it seems by this bargain I shall have the hogshead and firkin with the wine. Plow. 86. 27 H. 8. 27. Bro. Contract, 4.

If one sell me all his trees in such a wood, and that I shall not cut them until *Michaelmas*, and in the interim hawks do breed in the trees; it seems in this case that the vendor shall have them, * and that I may not meddle with them. And yet see Co. 11. 58, which seems to be to the contrary. 27 Asa. 29.

* P. 226.

7. How and to what purposes a deed of bargain and sale of lands, and the enrolment thereupon shall relate. And how and to what purposes not.

The enrolment of a deed of bargain and sale, when it is done within the six months, shall to most purposes relate to the time of the delivery or of the date of the deed. And it is given as a rule, that it shall have relation to the time of the delivery of the deed, viz. to avoid all mean estates and charges made to a stranger by the bargainor after the delivery of the deed before the enrolment, but not to devert any estate lawfully settled in the interim in the bargainee himself. And therefore if one bargain and sell his land by deed indented to one, and after, before the deed is enrolled, he enter into a statute, or grant a rent-charge out of this land, or make a lease of the land to another, and then the deed is enrolled within the time; in this case the relation shall avoid all the mean charges and estates. And if A. bargain and sell his land by deed indented to B. and afterwards doth sell the same land by deed indented to C. and the deed made to C. is first enrolled, and then the deed made to B. is enrolled also within the six months; in this case B. shall have the land, and Co. 4. 71. Bro. fait Enrol. 9.

of the bargainor or his heirs, in the case put above, yet the bargainor and his heirs would have equitable estates, or trusts in equity. As no use can arise, in a bargain and sale, in favor of any person from whom the consideration does not move, it may be proper to observe, that it is objectionable to make a settlement by *bargain and sale*; for as the uses under a bargain and sale can only arise in favor of those who pay the consideration, it must be clear, that *contingent estates* cannot possibly arise under it. Neither under a bargain and sale can the powers, generally speaking, of leasing and selling and exchanging be exercised. A lease, however, it would seem, may be granted under a special power, to a person from whom a valuable consideration moved at the time of the execution of the deed. See Rol. Abr. 786. (M.) Moore, 547.

(x) But if there was a subsisting term of years in the lands, or if the bargainor had only a reversionary interest in them, in that case it is presumed the term of twenty years would not commence till the expiration or other determination of the subsisting term, or till the reversionary interest came into possession; otherwise the grantee of the twenty years term might never have the benefit of it. To hold in such a case that the term should commence presently, would be contrary to the rule that deeds shall be construed most strongly in favor of the grantee.

(y) A covenant in a bargain and sale not enrolled is binding. 1 Ld. Raym. 368.

the

Dier, 218.
Curia. M.
3 Jac. B. R.

the relation of his enrolment shall make the enrolment of the other deed void (z). So if *A.* levy a fine of the land to *C.* yet *B.* shall have the land. But if the first deed made to *B.* be not enrolled within the six months, and the deed to *C.* be enrolled within the six months, *contra*.

Co. 4. 71.

If *A.* bargain and sell land to *B.* and after levy a fine to *B.* of the same land, and after within the six months the deed is enrolled; in this case *B.* shall take by the fine, and not by the bargain and sale (a).

Bro. fait En-
rol. 9.

If one joint-tenant alien all his lands in *Dale* to *A.* and before the enrolment the other joint-tenant die, and after the deed is enrolled; in this case but a moiety, and not the whole land doth pass (b).

So held 4 Car.
B. R.

If *A.* bargain and sell his land to *B.* and after this *A.* doth become bankrupt, and the commissioners sell the land to *C.* and after the deed is enrolled within six months; in this case *B.* and not *C.* the purchaser shall have the land (c).

Bankrupt.

Pasch, 15 Jac.

If *A.* bargain and sell his land held *in capite* to *B.* in fee, and *B.* dieth before enrolment, and then the deed is enrolled; in this case the heir of *B.* shall be in ward. And so was it held by all the justices in *Sir Walter Earl's case*,

Contrarium
tent. per Just.
Berkley, Hil.
11 Car.

Pasch. 15 Jac. Curia Ward. And yet in this the wife of the bargainee shall not have dower, as was held by *Anderson*, chief justice, and justice *Walmsley*, 3 Jac. Co. B. and again in *Sir Robert Baker's case*, 6 Jac. And if one bar-

Dower.

gain and sell his land to *I. S.* and after this the rent incur; and then the deed is enrolled; the bargainee, and not the bargainor, shall have the rent. *Per curiam*, *B. R. Hil. 11 Car.*

Rent.

22 Eliz.

If *A.* bargain and sell his land to *B.* in fee, and then marry *C.* and die, and *C.* is endowed, and after the deed is enrolled; in this case * the dower of the woman shall be taken away by relation, as was held in *Baron Frevil's case*, 22 Eliz. Co. B. (d).

* P. 227.

(z) Accordingly in Wood's Inst. 259, if two bargains and sales are made of the same lands to two several persons, and the last deed is first enrolled, and afterwards the first deed is also enrolled within six months, the first buyer shall have the land; for when the deed is enrolled, the bargainee is seised of the land from the delivery of the deed, and the enrolment shall relate to it. See further, Mo. 41. Cro. Jac. 53. 409; Noy, 106. If a man bargains and sells to *A.* and afterwards makes a bargain and sale of the same land to *B.* and the deed to *B.* is first enrolled, but the deed to *A.* is not enrolled within six months, the bargain and sale to *B.* is good; but if the deed to *A.* had been enrolled within the six months, the deed to *B.* had been void. Hob. 165.

(a) For when the fee-simple passed by the fine to the conusee and his heirs, the enrolment of the deed afterwards could not divest and turn the estate out of himself which was absolutely settled in him by the fine; for then, where he was in before in the *per*, he would be now in in the *post*. 4 Co. 71 a. Where a tenant to the *præcipe* for suffering a recovery is made by bargain and sale, the recovery may be suffered before enrolment, for there is a good tenant to the *præcipe*; provided the deed is afterwards enrolled within six months from the date. See 1 Vent. 361. *Perry v. Bowes*, Vid. Abr. Deeds (N.) pl. 5. 2 Inst. 675. *Selwyn v. Selwyn*, 2 Bur. 1131.

(b) For the enrolment had relation to the making and delivery of the deed; so that it shall give nothing but that which was sold by it at the time of the delivery of the deed. Vin. Abr. Deed (K.) pl. 6.

(c) Whether *B.* or *C.* would take the land would depend upon circumstances. If *A.* had committed an act of bankruptcy at the time of making the bargain and sale, and the commission was taken out within two months afterwards, or if not within two months, yet if *B.* had notice of an act of bankruptcy, or of the insolvency, &c. of the bankrupt, in these cases *C.* would be entitled to the lands. See the acts of the 46 Geo. 3. c. 135. and 49 Geo. 3. c. 121.

(d) But relation in several cases shall aid acts in law, as in the case of *dower*, &c. though not acts of parties, for void acts of the parties cannot be made good by relation or fiction of law. 3 Co. 29 a. Co. Lit. 150 a.

Release.

If *A.* bargain and sell land to *B.* and *C.* in fee, and *B.* release to *C.* before the enrolment; this release is void. 3 Jac. Co. B.

If *A.* disseisor, bargain and sell the land disseised to *B.* in fee, and the disseisee doth release to the bargainor, and after the deed is enrolled; in this case this release shall avail *B.* (e). So held in Mocket's case, 10 El. 6 Jac.

If *A.* bargain and sell his land to *B.*, and *B.* before enrolment doth bargain and sell the land to *C.*, the first deed is enrolled, and then the second deed is enrolled: in this case the last bargain and sale is void, and shall not be made good by relation, as was held by the court in Sir Robert Barker's case.

If a lease be made rendering rent, on condition to re-enter for non-payment, and the lessor bargain and sell the reversion by deed indented, and after the deed made the rent is in arrear, and then the deed is enrolled: in this case it shall not relate to give a re-entry for the condition broken.

So was it held in Sir Christopher Hatton's case.

If *A.* bargain and sell land to *B.* in tail, and *B.* before enrolment of the deed, doth make a lease according to the statute of 32 H. 8. and after the deed is enrolled: this is a good lease (f).

So hath it been adjudged.

And now we come to a *Gift*.

(e) If a disseisor bargains and sells land, and the disseisee releases to bargainee before enrolment, it is void. Arg. Rol. R. 425, says it was so adjudged *Mick.* 10 Eliz. *Mocket's case*. But a release to the disseisor before enrolment had been good, and then the enrolment should pass the estate to the bargainee, and he shall take advantage of the release. 1 Rol. Rep. 425. *Mick.* 14 Jac. in pl. 16. Vis. Abr. Deeds (O.) pl. 11.

(f) See more amply, as to the operation of a bargain and sale, and of the enrolment thereof, and in what cases and in what manner it shall relate. Bac. Abr. Bargain and Sale (E.) Vin. Abr. Bargain and Sale (K. to N.) Enrolment (E.) Com. Dig. Bargain and Sale (B. 9.) It may be proper to notice here a few points relative to the conveyance (commonly called a bargain and sale) made by the commissioners, of a bankrupt's estate. With respect to this conveyance, though it must be enrolled, yet no specific time is prescribed for the enrolment, except where it relates to estates of which the bankrupt was seised in tail, in which case the act of the 21 Jac. 1. c. 19. s. 12. requires it to be enrolled within six months, and which period it is held must be six lunar months. Unlike the case of a proper bargain and sale, (which we have seen takes effect from its delivery, provided it is afterwards duly enrolled) a bargain and sale from commissioners of bankrupt passes nothing till it is enrolled. See Cooke's Bankrupt Laws.

CHAP. XI.

OF A GIFT.

THIS word, importing no more than the transferring Gift. *Quid.*

of the property of a thing from one to another, is of larger extent than a feoffment, which is always applied to an immoveable thing; for this is often applied to moveable things also, as trees, cattle, household-stuff, &c. the property whereof is and may be altered as well by gift, as by sale or grant. And in this sense a gift is sometimes by the act of the party; as when one man doth give a thing to another. And this is, or may be, either by word or by writing (a). And sometimes it is by act of law; as when a woman is married to a husband, or one is made executor to another; in these cases by the marriage only, or the taking of the executorship, the law gives all the goods of the woman to the husband, and of the testator to his executor. So where one doth take my goods as a trespasser, and I recover damages for them upon a suit in law; in this case the law doth give him the property of the goods, because he hath paid for them. But this word gift is sometimes taken more * strictly, and applied to a conveyance or passing of an estate of lands or tenements to another in tail, wherein this word *dedi* is most commonly used (b). And then, he which doth so give the land is called the donor, and he to whom it is given, the donee. Donor. Donee. And this for the most part is by deed, though it may be otherwise. And for these deeds of gift, of immoveable or moveable things, see *Deed* and *Grant*, in *toto*, wherein all the learning touching this matter is involved. * P. 228.

And so we pass to a *Grant*.

(a) By the civil law a gift of goods is not good without delivery, yet in our law it is otherwise. *Per Coke*, C. J. 1 Rol. Rep. 61.

(b) The conveyance by gift, *donatio*, is properly applied to the creation of an estate tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it: for the operative words of conveyance in this case are *do* or *dedi*; and gifts in tail when made by feoffment are equally imperfect without livery of seisin, as feoffments in fee-simple. And this is the only distinction that *Littleton* seems to take, when he says, "it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee," viz. feoffor is applied to a feoffment in fee-simple; donor to a gift in tail; and lessor to a lease for life, or for years, or at will. 2 Bl. Com. 316. See further as to a gift, in 1 Wood. 116. 659. Br. Abr. Done. Vin. Abr. Gift. As to gifts (or conveyances without valuable consideration) of real estates, such gifts or conveyances are generally denominated *voluntary conveyances*, or *voluntary settlements*; with respect to which, see *supra*, page 63, note (m).

CHAP. XII.

OF A GRANT.

Grant. *Quid.*

THIS word is taken largely, where any thing is granted or passed from one to another. And in this sense it doth comprehend feoffments, bargains and sales, gifts, leases, charges, and the like, for he that doth give, or sell, doth grant also. And thus it is sometimes in writing or by deed, and sometimes it is by word without writing. But the word being taken more strictly and properly, it is the grant, conveyance, or gift by writing, of such an incorporeal thing as lieth in grant, and not in livery, and cannot be given or granted by word only without deed. Or it is the grant of such persons as cannot pass any thing from them but by deed, as the king, bodies corporate, &c. And this albeit it may be made by other words, yet it is most commonly made by this word [grant] as being most proper to this purpose. Know therefore that amongst hereditaments, some are such as are said to lie in livery, *i. e.* such as whereof livery of seisin may be made, as manors, houses, lands, &c. (a). And some are such as do not lie in livery, *i. e.* whereof no livery of seisin can, nor need to be made, but they pass by the delivery of the deed without any more; and of this sort are rents, reversions, services, advowsons in gross, and the like, which things cannot pass from man to man without deed, or matter of record, which is of a higher nature than a deed (b). And he that makes this grant is called the grantor, and he to whom it is made is called the grantee.

Co. super Lit.
172. 9. Fin-
chessy, 92.Co. super Lit.
49.Grantor.
Grantee.2. *Quotuplex.*

It is taken here in the largest sense as that which doth comprehend both. And so some grants are of the land or soil itself: and some are of some profit to be taken out of or from the soil, as rent, common, &c. And some are of goods and chattels: and some are of other things, as authorities, elections, &c. And they are made sometimes by matter of record, and sometimes by deed or writing in the country, and sometimes by word without either. Some grants also tend to charge the grantor with something he

* P. 229.

(a) That is, where the party is seised of them in possession. Where he is only seised in remainder or reversion expectant upon an estate of freehold, *there* they do not lie in livery but in grant.

(b) In noticing the distinction between hereditaments which lie in *livery*, and those which lie in *grant*, or between things corporeal and things incorporeal, it is held, that there can be no discontinuance of things which lie in grant; and therefore if tenant in tail of a rent, advowson, common, or remainder or reversion expectant on a freehold, make a grant by deed or fine, or disseise the tenant of the land out of which the rent is issuing, whereof he is seised in tail, and make a feoffment with warranty, that these acts work no discontinuance of the intail, for nothing passes but during the life of the tenant in tail, which is lawful. Co. Lit. 327 b. 3 Co. 85 b. Also of things which may be transferred without the notoriety of livery of seisin, such as rents, advowsons, &c. (which lie in grant,) a man cannot by any act in *pais* forfeit them. Bac. Abr. Grants.—See further, as to the nature of a grant, in 2 Bl. Com. 317. Vin. Abr. Grants (A. 2.)

was not charged with before; and some to pass something out of him to the grantee; and some tend to discharge the grantee of something, wherewith he was charged or chargeable before, and whereof he is now hereby discharged (c).

Co. 11. 73.
Plow. 553.

Perk. sect. 1.

Regularly these things are requisite in every good grant or gift. 1. That there be a grantor, donor, &c. and that he be a person able to grant, and not disabled by any legal or natural impediment. 2. That there be a grantee, donee, &c. and that he be a person capable of the thing granted, and not disabled to receive it. 3. That there be a thing granted, and that the thing be such a thing as is grantable. 4. That it be granted in that order and manner that law requireth: as where the thing is not grantable without deed (d), that it be done by deed. And if it be by deed, that the deed have apt words to describe and set forth the person of the grantor and grantee, and thing granted, &c. and that all necessary circumstances, as sealing, and delivery, and livery of seisin (e), and attornment where it is needful (f), be observed. 5. That there be an agreement to, and acceptance of, the grant or thing granted by him to whom it is made: and for default in either of these particulars a grant may be void. *In acquirendo rerum dominio scilicet quod donationes non valent licet sint inceptæ nisi sint perfectæ.* But if grants be very ancient, and the things granted have been enjoyed according to the grant ever since the making of it; in this case the grant may be good, notwithstanding some legal defect in some of these particulars (g).

Bro. Grant,
89.

Perk. sect. 64.

4 H. 7. 17.
Plow. 150.
16 H. 7. 3.
Lit. sect. 60.

Corporations, as dean and chapter, mayor, and commonalty, and such like, regularly can neither grant lands, goods, or chattels, but it must be by deed. But the grantees of such persons, and all other common persons, may grant or give any thing which doth lie in livery, as manors, houses, lands, and such like things, in fee-simple, fee tail, for life, for years, or at will, by word without deed (h). And if a lease be made of any such thing for life or years, with a remainder over in fee-simple, fee tail, or for life; it is good, albeit the same be done by word without any deed in writing (i).

3. Things necessarily requisite to every good grant.

4. What shall be said a good and sufficient grant, gift, or sale: or not.
1. For the manner of it; and what may be granted without deed; or not; and how.
Rents, services, &c.

(c) See accordingly, 1 Wood. 660. Shep. Law of Assur. 150.

(d) Since the Statute of Frauds, no title in lands, tenements, or hereditaments can be granted without a writing, except leases not exceeding three years.

(e) Of things which properly lie in grant, there can be no livery of seisin.

(f) Attornment is now rendered unnecessary in all cases by the act of 4 Ann. c. 16. s. 9.

(g) Where there has been a long quiet possession, grants even from the crown, will frequently be presumed. Upon the subject of presuming grants and conveyances, see the cases of *The Mayor of Kingston upon Hull v. Thomas*, Cowp. 102. *Eldridge v. Knott*, ib. 214. *Bidel v. Beard*, cited 3 Durnf. & East's T. R. 155. *Beckford v. Wade*, 17 Ves. 87. *Hillary v. Waller*, 12 Ves. 236. and *England v. Slade*, 4 Durnf. & East's T. R. 682. On presuming surrenders of terms of years, see *Doe v. Syburn*, 7 Durnf. & East's T. R. 2. *Doe v. Staple*, 2 Durnf. & East's T. R. 684. and see *Burdett v. Wright*, Barn. & Ald. 710. and *Doe v. Hilder*, ib. 782. But see Mr. Sugden's remarks upon these two cases. Lett. to Mr. Butler.

(h) Not since the statute 29 Car. 2. c. 3, for prevention of frauds and perjuries, except in the case of leases not exceeding the term of three years.

(i) See the last note.

Such

Such things as are said to lie in grant and not in livery, generally cannot be granted or given, had or taken, without deed; unless it be in some special cases (*k*). And therefore rents and services, and such like things which are in gross, and not incident to some other thing, may not be granted without a deed. And therefore if a rent-charge be granted unto me for years, I may not grant this rent over without deed. And if there be lord and tenant of arable land by fealty, and the service of yielding the tenth sheaf of corn before it be sowed; the lord cannot grant this service for * years without deed. But if a rent, or any service be parcel of, or incident to, a manor, or any other thing which is grantable without deed; in this case, by the grant of the principal by word, this thing may pass, as belonging thereunto without any deed (*l*). Also rents or services may be granted upon a partition by one coparcener to another without deed (*m*).

Co. super Lit.
49. Dier, 139.
Perk. sect. 61,
60, 63. Bro.
Grant, 59.

* P. 230.

Reversion or
remainder.

A reversion cannot be granted in fee-simple, fee tail, for life, or years, without deed; unless it be in case where it is parcel of a manor. But a reversion may be granted upon a partition by one coparcener to another without any deed. And the same law is of a remainder. And therefore if one make a lease for life or years to one, the remainder in fee-simple, fee tail, or for life, to another without deed, howsoever this be a good remainder in the first creation without deed, yet this remainder cannot be granted over without deed (*n*).

Perk. sect.
61.

Dier, 174.
Plow. 433.
Bro. Grant,
104.

Advowson,
tithes, &c.

A parsonage or rectory, albeit it consist of nothing but tithes, and the like, besides the church and church-yard, and it hath no house nor glebe belonging to it, yet may be granted without deed in fee-simple, for life, or years; and then the tithes and offerings will pass as incident (*o*). But the tithes alone, or a portion of tithes, oblations, mortuaries, or obventions, are not grantable by themselves without deed. And therefore a lease parol of tithes, albeit it be but for years, is not good. And if the parson agree with one of his parishioners, that he shall have his own tithes; this is not a good grant of the tithes, neither may it be pleaded or used so; but perhaps by way of agreement a parishioner may retain his tithes. And if a lessee for years of tithes will grant it over to another at will only, it cannot be done without deed, as was held by Baron Denham, 2 Car. at Sarum assizes. And yet it is held that a parson may grant his tithes from year to year to him that is to pay them without any deed, but this is by way of retainer (*p*). But this grant or agreement must be made to and with the party himself that is to pay the tithe, and not with another: neither can this interest be assigned, or a

15 H. 7. 8.
16 H. 7. 3.
19 H. 8. 12.
21 H. 6. 43.

All this was
agreed 36 El.
B. R.

Mich. & Jac.
Dr. Long-
worth's case.

(*k*) Because of things which lie in grant, no possession can be delivered; and they are not like corporeal inheritances, which pass by livery; and therefore to supply the place of that notoriety which arises from livery, a deed is necessary.

(*l*) Not since the Statute of Frauds.

(*m*) Not, it is presumed, since the Statute of Frauds.

(*n*) A deed or writing now necessary in all the above cases. See 29 Car. 2. c. 3.

(*o*) See the last note.

(*p*) See the Chapter on Leases, on the subject of Leases of Tithes.

stranger take advantage of it, as hath been agreed in the case of *Hawkes and Brasfield, Pasch. 3 Jac. B. R.*

21 Ed. 3. 38.
11 H. 4. 3.
Dier, 29. 10.
Co. 1. 1.

An advowson in gross cannot be granted without deed; yea the grantee of the grantee of an advowson is to shew both the deeds. But an advowson is grantable upon a partition between coparceners without deed. And an advowson incident to a manor, or piece of land, is grantable with the manor or land without any deed (g). The next avoidance to a church is not grantable without deed (r).

Plow. 150.
9 Ed. 4. 47.
Perk. sect. 61.

Common of pasture, of estovers, turbary, fishing, &c. cannot be granted in fee-simple, fee tail, for life, or years, unless it be in case of partition, or of appendancy as incident to some corporeal thing, *without deed. And therefore if a man grant by word of mouth to me common for twenty beasts in his manor; this is not good. Neither, if it be granted to me by deed, may I grant this over to another without deed. But if a man have common of pasture appendant or appurtenant to his land; in this case he may grant his land with the common appendant by word only without any deed (s). Franchises, as fairs, markets, courts, warrens, and the like, or the profits thereof, are not grantable without deed. But it seems a hundred is grantable without deed; for that is *liberum tenementum* (t). The profits of a mill, county, ferry, corody, or the like, are not grantable without deed.

Common of pasture, &c.

* P. 231.

15 H. 7. 8.

Franchises, as fairs, markets, courts, warrens, and the like, or the profits thereof, are not grantable without deed. But it seems a hundred is grantable without deed; for that is *liberum tenementum* (t). The profits of a mill, county, ferry, corody, or the like, are not grantable without deed.

Franchises, and such like things.

6 H. 7. 9.
Dier, 91. 126.
Doct. & Stud. 16.

Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entry to any real or personal thing, are not grantable at all, but by way of release to the tenant of the land, &c. by which means it may be extinguished: but this may not be neither without deed. And therefore if a man take my goods as a trespasser, or I deliver him my goods to keep, and after I will give these goods to him; I cannot do this without deed.

Things in action and such like things.

Dier, 281.

An election, condition, covenant, assent, licence, or liberty, cannot be created and annexed to an estate of inheritance or freehold without deed.

Co. 9. 9.

A privilege to hold land for life without impeachment of waste is not grantable without deed. Offices for the most part are not grantable without deed. And yet some inferior offices, as stewardships, bailiwicks, and the like, are; for such officers a lord of a manor may retain by word without deed.

Offices.

Perk. sect. 57.
60. Bro.
Done. Dier,
370. 5 H. 7.
25, 36.
Plow. 150.

Most chattels real and personal may be given and granted without deed. And therefore if a man by word of mouth grant, give, or sell me his lease for years (u), the wardship of body and land, or the wardship of land that he hath by reason of a tenure by knight's service, or by grant from the king, or grant or sell me the trees standing

Chattels.

(g) A deed now necessary in the above cases.

(r) See accordingly in Cro. Eliz. 163. *Crispe's case*. Long and Hemming's case, 1 Leon. 207. Co. Lit. 332. 334. and *Whistler's case*, 10 Co. 63. See more amply how an advowson shall be granted, in Com. Dig. Advowson (C. 1.)

(s) See the Statute of Frauds, 29 Car. 2. c. 3.

(t) See the Statute of Frauds.

(u) A lease is not assignable without a writing, signed by the parties, since the Statute of Frauds, 29 Car. 2. c. 3; and see *Queen v. Goddard*, 3 Salk. 171.

upon his ground, the corn growing upon his land, his horse, sword, plate, or other household stuff; this is a good grant or gift. But the wardship of the body of an heir only cannot be granted without deed. So a next presentation cannot be granted without deed (w).

What by the same deed.

If one grant his reversion of land to one, and by the same deed granteth a rent out of the same land to another, and delivereth the deed to both of them at one time; this is good, and shall enure first as a grant of the rent to one, and then as a grant of the reversion to the other. Plow. 540.

If one convey land to another, and the grantee by the same deed doth grant a rent or common to the grantor out of the same land conveyed; this is as good as if it were by another deed. Dier 6.

P. 232. By what words of grant. *Dedi & concessi* be the most apt words for all kind of grants; yet it may be by other words, and the grant as good as by those words (x).

The best way in grants is to grant by words in the present sense as well as in the preterperfect tense. But a grant by words of the preterperfect tense only, as by *Dedi & concessi* only, without words of the present tense is good (y). 35 H. 6. 11.

3. In respect of the person of the grantor, &c. and the meaning of him. And who may be a grantor. And how.

Touching this part two things are requisite: 1. That the grantor be a person able. 2. That, if the grant be by deed, he be sufficiently described and set forth, either by his proper names or else by some other matter of distinction. Note, therefore, that whosoever may be a feoffor, may be a grantor. And any, natural, politic, or corporate body, (not prohibited by law, as monk, friar, woman covert, infant, and such like) may be a grantor, donor, &c. And the grants of such person, will be good. See Feoffment case 9. Numb. 4. Perk. sect. 3.

Alien.

An alien may, and is able to grant or give any thing that he is capable to have or take by grant or gift (z).

(w) See accordingly, Wood. 662; and see as to a grant of the next presentation, Com. Dig. Condition (C. 2.)

(x) The words *dedi* or *concessi*, may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c. and it is in the election of the party to use to which of these purposes he will. Co. Lit. 301. b. That formal words are not necessary on a grant, see *Covestry v. Covestry*, and *Wilkinson v. Troumer*, 2 Wils. Rep. 75.; and in the case of *Shore v. Pink*, 5 Durnf. & East's T. R. 124. it was laid down that the words *limit* and *appoint* might operate as words of grant, and pass a reversion.

(y) In many cases the law creates a good grant without express words; because it is the design of the law to render all contracts binding and effectual, so far as the intention of the parties may be gathered from the deed; and such interpretation is made strongest against the grantor, because he is presumed to receive a valuable consideration for what he parts with, 2 Roll. Abr. 56. Bac. Abr. Grants (F.) See further by what words grants may be made, or what may be said to amount to a grant, in Vin. Abr. Grants (H. 7.)

(z) An alien may purchase any thing but can hold nothing except a lease for years of a house for convenience of merchandize; all other purchases (when found by inquest of office) being forfeited to the king; and if the alien grants or conveys away the lands, the king has the same right to them as against the grantee, that he had as against the alien. An alien is not capable of inheriting or transmitting by descent; but if he be made denizen, the issue which he hath afterwards shall be heir to him, Co. Lit. 2. 8.—The law will not give an alien the benefit of taking by act of law; as by descent, curtesy, dower, or guardianship, because he cannot keep it; & *lex nihil facit frustra*. Per Hale, C. B. 1 Vent. 417.—Alienation to an alien is a cause of forfeiture to the crown of the lands so alienated. 2 Bl. Com. 274. See more fully, as to the law respecting the capacity of an alien to acquire or convey property, in the notes to the 13th edit. Co. Lit. 3. 8. 42. Vin. Abr. Alien (A.) Com. Dig. Alien (C.) and see *supra*, page 56, note (x).

A person

Perk. sect. 26.
See ch. 2.
Numb. 6.

A person attainted of treason or felony may give or grant his land; and this is good against all others besides the king, and the lord of whom his land is held. And he may grant or give his goods to relieve himself in prison; and this will be good against all others, and the king and lord also. A person outlawed in a personal action may give or grant his goods or chattels; and the gift or grant will be good against all others but the king (a).

Person attaint
or outlawed.

Co. super Lit.
3. Perk. sect.
8. 20. 41. See
ch. 2. Numb.
6.

The queen may without the agreement of the king make grants, gifts, &c. of her lands or goods (b), but another woman that hath a husband cannot give or grant her lands or goods without her husband's consent, unless it be in some special cases. And albeit she do recite by the deed that she is sole and not covert, yet this will not help. And if the case be so, that by agreement between her and her husband, there be a certain portion of her husband's lands or goods allotted unto her to dispose of, and manage at her pleasure, yet she alone without her husband can make no good grant or gift of any part of these lands or goods (c). But if she grant any thing by fine, and the husband do not avoid it during the coverture; this grant will bind her after his death (d). And if she make a gift or grant of her husband's goods, it is thought this is not good until her husband agree to it (e).

Woman co-
vert.

9 H. 7. 24.
26 H. 8. 2.
Perk. sect. 12,
13, 14. 19.
7 H. 4. 5.
See chap. 2.
Numb. 6.

An infant cannot make any gift or grant, &c. that is good, but in special cases; for if he maketh any grant or gift that taketh effect by the delivery of the deed only, as if he grant a rent-charge out of his land, or make a feoffment with a letter of attorney to give livery of seisin, or give or sell his horse, and the buyer or donee take him himself; these are void *ab initio*. And if the grant, or gift take effect by the delivery of his own hand, as if he make a feoffment and give livery of seisin himself, or sell a horse and deliver him with his own hands; this is voidable by the infant himself, or others that shall have his right, &c. (f). But if an infant grant any thing by fine; this must be avoided during his minority, or else it cannot be avoided at all (g).

* P. 233.

(a) Persons attainted of treason or felony are incapable of conveying, after the offences committed, provided attainder follows. Co. Lit. 42.—See more amply as to the consequences of attainder or outlawry, with respect to the forfeiture of the lands of persons attainted or outlawed, and how far and in what cases grants made by them are effectual, Bac. Abr. Forfeiture (A.) Outlawry (D.) Com. Dig. Forfeiture (B. 1.) Utigary (D.) Bac. Use of the Law, 42. 1 Wils. Rep. part 2. page 219. 2 Bl. Com. 220. Vin. Abr. Attainder (B.) Forfeiture (P.)

(b) The queen consort is of ability to purchase lands, and to convey them, to makes leases, to grant copyholds, and to do other acts of ownership, without the concurrence of her lord; a very ancient privilege and which no other married woman has. See 1 Bl. Com. 218. 15th edit. and further in Co. Lit. 133. a.

(c) By means of a power over a use she may convey lands. See Treatise on Marriage Settlements, page 334.

(d) See *supra*, page 7, note (w).

(e) As to grants by feme coverts, see more amply in Bac. Abr. Grants (A. 4.) Baron and Feme (I.) Com. Dig. Baron and Feme (P.) (Q.)

(f) A conveyance by lease or release made by an infant who was seized of the legal estate under a mortgage in fee, was held to bind the infant. *Zouch v. Parsons*, 3 Burr. 1794. The authority however of this case is not generally acquiesced in, and it is conceived it is a decision which cannot be supported on principle. But see *_____ v. Handcock*, 17 Ves. 384. where it was laid down that if an infant made a voidable conveyance in a case where he would have been bound to convey if of age, that there equity would restrain him from setting it aside.

(g) See *supra*, page 7, note (v).

Duress.

All grants that are made by duress, are voidable by the parties themselves that make it or others that have their estates, &c. But if it be done by fine, it is good and unavoidable (A). Perk. sect. 16.

Non sanæ memorie.

All gifts, grants, &c. made by deed in the country by those that are *non sanæ memoriæ* are good against themselves, but voidable by those that are their heirs, executors, or have their estate. But if it be by fine it is good and unavoidable. Co. 123, 124.
See cap. 2.
Numb. 6.

A man that is born dumb, or dumb and deaf, if he have understanding, may by delivery of the deed and making of signs make a good grant, gift, &c. But a man that is born deaf, dumb, and blind cannot (i). Perk. sect. 23.

Bastard.

A bastard may give or grant as well as any other man, after he hath gotten a name by reputation. Perk. sect. 26.

Parson.

A parson may grant any thing belonging to his parsonage for no longer time than for his own life, and therein likewise but during his residency, albeit he have the consent of the patron and ordinary. See Lease.

Corporation.

Neither the head without the members of a corporation, nor the members without the head, as dean without the chapter, or chapter without the dean, may give or grant any of the lands belonging to their corporation. Perk. sect. 31,
32, 33.

Executors.

One executor or administrator may give or sell any of the goods of the deceased; and this is good to bind all the rest (k). See Executors.

What grants ecclesiastical persons may make of their ecclesiastical lands; husbands of the lands of their wives; and tenants in tail of their lands intailed. See in *Lease*.

Misnaming.

The name of the persons in grants is set down only to distinguish persons, and to make the person intended certain: and therefore howsoever it be best and most safe to describe the person by his true and proper name of baptism, and also by his surname, and if it be a corporation by the true name whereby the corporation is made, yet mistakes in this case unless they be very gross, will not make void the grant. *Nihil facit error nominis cum de corpore constat.* And therefore if one that is a bastard hath gotten a name by reputation in the place where he doth live, or another man hath gotten another by common esteem than his own right name, or is usually called by another name than his true name in the place where he lives, in these cases they may grant by this name, and the grant is good. And if a man be baptized by one name, and after be confirmed by another; some have said he may grant by either * of these names. *Sed Quere.* And if *John* Co. 6. 63. super Lit. 3.

* P. 234.

Perk. sect. 39.

(A) But a Court of Equity would consider the party taking under such fine as a trustee for the consor, and direct a re-conveyance.

(i) See *Bac. Abr. Grants* (A. 5.)

(k) If a man appoints several executors, they are esteemed in law but as one person, representing the testator; and therefore the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession, or release, of the testator's goods, are deemed the acts of all; for they have a joint and entire authority over the whole. (*Godolph. Orp. Leg. 134. 1 Roll. Abr. 924. Went. Off. of Ex. 95.* And see further, post, in the chapter on Testaments.) But it is not so with respect to administrators, for the act of one is not binding upon the others. See *Toller's Executors and Administrators*, page 324.

Co. super Lit.
3. Fitz.
Grant, 67.
Perk. sect. 42.

at *Stile* grant by the name of *William* at *Stile*; this grant is good. *Et sic de similibus*. And these grants are good especially, when there is some other addition to make it more certain; as when a Duke, Marquess, Earl, or Bishop grant by their names of honour or dignity, and grant without any name, or with a false name of baptism; as when the Duke of *Suffolk* by the name of the Duke of *Suffolk*, without any more words, or by the name of *William* Duke of *Suffolk*, when his name is *John*, or the Bishop of *Norwich* grant so; these are good grants, because there is but one such Duke, and one such Bishop, within the kingdom. So if a Dean and Chapter, Mayor and Commonalty, grant by the name of their corporation without

Perk. sect. 40.

any addition of christian or surname; it is good. And especially then also are these grants good, when the true name doth appear in some other part of the deed. As when *John* at *Stile* reciteth by his deed that his name is *John* at *Stile*, and by the same deed doth grant by the name of *Thomas* at *Stile*. Or *Alice* at *Stile* reciting by her deed that she is a feme covert, when in truth she is sole.

3 H. 6. 26.
Perk. sect. 38.
42.

But if an ordinary man grant by his surname only without any name of baptism, or by his name of baptism without any surname at all; in these, and such like cases, for the most part the grant will be void for uncertainty; unless there be some other matter in the deed to help it, or some matter done *ex post facto* to supply it: for in some cases where the thing granted doth lie in livery, such a mistake or uncertainty in the grant may be holpen by the livery of seisin upon the deed afterwards. And so also it is in the names of corporations; for if the variance and mistake by omission or alteration be only in some small matter, so as it is literal and verbal only, the grant will not be hurt by it. But if the mistake or omission be in the substance of the name; the grant may be void by it. And therefore if

Co. 6. 63. 10.
122. 11. 19.
Dier 150. Co.
10. 124.

Decanus & capitulum ecclesiæ cathed' sanctæ & individ. Trin. Caerlil. grant by the name of *Decanus ecclesiæ cathed. sanctæ Trin. in Caerlil. & totum capitulum ecclesiæ predict*: this is good: *Et sic de similibus*: for if the sense doth still remain either expressly, or by necessary implication; and the description be such, as doth import a sufficient and certain demonstration of the true name of the corporation according to the foundation thereof, it sufficeth. But if any of the substance or essence of the name be omitted, *contra*. And therefore if a corporation incorporate by the name of *Prepositi & collegii regalis coll. beatæ Mariæ de Eaton juxta Windsor* grant by the name of *Prep. & sociorum Colleg. regalis de Eaton, &c.* leaving out *Collegium et beatæ Mariæ*; this grant is void (1).

Co. super Lit.
2. 3. Perk.
sect. 43. See
in Feoffment,

Touching this part three things are requisite. 1. That the grantee be a person capable, i. e. that he be a person in being at the time of the grant made, and not disabled

3. In respect of the grantee and the naming of him. And

(1) The words "*beatæ Mariæ*" are not mentioned in 10 Co. 124. to have been omitted; but the omission of these words, as well as of the word "*collegium*" is mentioned in Dier 150.

who may be a grantee, &c.
And how.

* P. 235.

by any legal * impediment to take by the grant. 2. That if the grant be by deed, the grantee be sufficiently named, or at the least set forth and distinguished by some circumstantial matter, and that he be so named or described as that he may be capable by that name whereby he is set forth. 3. That he himself, and not a stranger, do take by the same grant. Note therefore, that all natural and politic or corporate bodies that are not disabled by law may be grantees. And all persons that may be grantors may be grantees: and some others that cannot grant or give yet may take or receive. And a grant made to one, two, three, or twenty such persons is good. A grant of land, or rent in possession, to the right heirs of *I. S.* *I. S.* being then living, is void; for there neither is, nor can be, any such person *in rerum natura*; for no man can be an heir to another that is living. But such a grant to one in remainder is good, if so be that *I. S.* die before the particular estate end, and before the remainder happen. So if a grant be to him or her that shall be the first child of *I. S.* and he have no child at the time of the grant, this is void (*m*). So if a grant be made to the wife or child of *I. S.* when there is none such, it is void. As if a grant be to *I. S.* and to his first born son, or to *I. S.* and her that shall be his wife, and he hath at the time of the grant neither wife nor son: in these cases, the grant is void as to the wife and son, and *I. S.* shall have all by the grant (*n*).

cap. 9. Num. 4.
Co. 1. 101.
Perk. sect. 52.
54. Co. 2. 31.

Alien.

An alien may be a grantee; but if any thing be granted unto him whereof he is incapable, as any estate of lands in fee simple for life, or years, he cannot hold it, but the king will have it from him.

Co. super Lit. 2.

Prerogative.

Persons attainted.

A person attainted of treason or felony, before or after attainder may be a grantee; but he cannot hold the thing granted; for if the king or lord will, he may have it from him. So also persons outlawed in personal actions may be grantees of lands, or goods; but the king will have the profits of the lands and property of the goods.

Co. super Lit. 2. Perk. sect. 48.

Woman covert.

A woman covert may be a grantee; but her husband may by his disagreement avoid the grant. And yet if he do not avoid it in his life-time, the grant will be good: and he that will have the grant to be void, must shew that the husband did disagree to it.

Perk. sect. 45.
Co. super Lit. 2.

Infant.

An infant may be a grantee, for this is presumed to be for his advantage. And yet at his full age he may agree

Perk. sect. 4.
Co. super Lit. 2.

(*m*) If it was supported by an estate of freehold it would be good.

(*n*) But if the grant was to *I. S.* for life, with remainder to his first born son or to his wife, in such a case the remainder to the son or the wife would be good as contingent remainders, and would take effect (if not destroyed, supposing there were no trustees to preserve them) upon the marriage of *I. S.* or the birth of his first born son. Formerly a child to whom a contingent remainder was limited, could not take such contingent remainder, unless he was born in his parent's life-time, or unless an estate was limited to trustees, after the parent's decease, to preserve the contingent remainder to such after-born son. But now by the stat. 10 and 11 *Will. 3.* c. 16. posthumous children are enabled to take contingent remainders in the same manner as if they had been born in their father's life-time, although there should be no estate limited to trustees after the decease of the father, to preserve the contingent remainder to such after-born children. This act has therefore rendered such a limitation to trustees no longer necessary. See further how far the law regards and takes notice of infants in *centre of mere*, 1 *Bl. Com.* (15th edit.) 130. vol. ii. 169. *Bac. Abr.* Infancy (C.)—*Fearne on Cont. Rem.* 3d ed. 235. and see *Treatise on Marriage Settlements*, page 262, note (*s*).

to it or avoid it, perfect it, or disagree to it, and without any cause shewed.

Co. Idem. A man *non sane memoriae* may be a grantee as well as Men *non sane memoriae*. any other man, and it seems these grants cannot be afterwards avoided. But such men may not be grantees of offices of trust and such like things.

Co. Idem. A bastard, persons deformed having human shape, Bastard. lepers, and such like, may be grantees of lands or goods, &c. as other men may be (o).

Co. Idem. An hermaphrodite may be a grantee according to the Hermaphrodite. most prevailing sex.

Co. super Lit. A clerk convict, and a man imprisoned, may be a P. 236. S. Perk. sect. grantee as well as any other. And so also may a villain Clerk convict. 48. 51. of the king or of a common person; but he cannot retain Villains. the thing granted, for the king or lord may have it from him if he will. But monks, friars, and such like persons, cannot be grantees, for they are utterly disabled (p).

(o) See further in what cases bastards shall take by grant or devise in Vin. Abr. Bastard (P.) Com. Dig. Bastard (E.)

(p) Till the 18th year of the late reign, persons professing the Roman Catholic religion, were, by stat. 11 and 12 William 3. c. 4. s. 4. disabled to purchase lands, rents, or hereditaments; and all estates made to their use or in trust for them were declared void.—By an act however of 18 Geo. 3. c. 60. several parts of the stat. of 11 and 12 Will. 3. are repealed, and amongst other parts, so much thereof “as disables persons educated in the popish religion, or professing the same, under the circumstances therein mentioned, to inherit or take by descent, devise or limitation, in possession, reversion, or remainder, any lands, tenements, or hereditaments, within the kingdom of England, dominion of Wales, and town of Berwick upon Tweed, and gives to the next of kin, being a Protestant, a right to have and enjoy such lands, tenements, and hereditaments, and also so much thereof as disables Papists from purchasing lands in England or Wales, and as makes void all estates, tenements, &c. for their benefit.” But to give Roman Catholics the benefit of the act of Geo. 3. they must take the oath prescribed by the act, within the period mentioned in it. The act of Will. 3. is therefore only provisionally repealed.

Notwithstanding the act of Will. 3., it was not unusual for Roman Catholics to make purchases of lands, and in order to enable them to sell such lands as they had either purchased or acquired by descent, &c. the act of 3 Geo. 1. c. 18. was passed; which enacts, that sales by Papists to Protestant purchasers, should not be impeached by reason of any disability in the vendor, or any person under whom he claimed, unless the person taking advantage of such disability should have recovered before the sale, or given notice of his claim to the purchaser, or before the contract for sale, should have entered his claim at the quarter sessions and *bond fide* pursued his remedy. In consequence however of the act containing a proviso that the act of the 11 & 12 Will. 3., disabling Catholics from purchasing, should remain in full force, a doubt arose, whether the act operated in favour of Protestant purchases, in cases where the lands had been previously purchased by Catholics; it being contended that Catholics being still restrained from purchasing, they could have no title to the lands they purchased, and consequently could make none to Protestant purchasers. The act however of Geo. 1. being passed for the express purpose of securing purchases made by Protestants, and expressly enacting, that no sale for a full and valuable consideration made to a Protestant by any Catholic who was reputed the owner of the lands, or in receipt of the rents, should be impeached by force of certain recited acts, amongst which is the very act of the 11 & 12 Will. 3, it can hardly possibly be supposed, that the legislature meant the above noticed proviso to annul the enacting part, so far as respected lands which had been purchased by Catholics and afterwards sold to Protestants, and yet such would be the effect of a literal and unrestrained construction of the proviso. The probability therefore, is, that by the proviso the legislature merely meant to say, that as to lands which they had purchased, Catholics should still be liable, till they sold such lands to a Protestant purchaser, to the law as it before stood. On the construction too of the above noticed proviso, see the cases of *Wildgoose v. Moore*, 1 Atk. 535. *Harrison v. Southcote*, ibid. 528. and 2 Ves. 380. *Smith v. Read*, 1 Atk. 526. and *Dillon v. Dillon*, 2 Scho. & Lef. 13.; which favour the opinion that the act of Geo. 1. protects Protestant purchasers, in cases where the land had been previously purchased by Catholics; so that there is little doubt but that Protestants may safely make such purchases where they pay a full and valuable consideration for them. Upon the expression, “full and valuable consideration,” in the act of Geo. 1., it may be observed, that it is not necessary to the validity of a purchase by a Protestant, that the utmost value should be given, but merely that such a fair and reasonable price should be given as to shew the reality and *bond fides* of the transaction. See *Wildgoose v. Moore*, cit. 1 Atk. 535. See the act of the 30 Geo. 3. c. 19. for the further relief of Protestant purchasers.

Misnaming or
not naming.

Regularly it is requisite that the grantee be named by his names of baptism and surname, and so it is most safe; and special heed must be taken to the name of baptism, for that a man cannot have two or more names of baptism, as he may of surnames. And yet in some cases, though the name be mistaken, the grant is good. ^a As if a grant be to *I. S.* and *Em* his wife, and her name is *Emelin*, ^b or a grant is made to *Alfred Fitzjames* by the name of *Etheldred Fitzjames*; ^c or a grant be to *Robert* Earl of *Pembroke*, where his name is *Henry*; or to *George* Bishop of *Norwich* where his name is *John*; ^d or a grant be to a mayor and commonalty, or a dean and chapter, and mayor or dean is not named by his proper name; ^e or a grant be to *I. S.* wife of *W. S.* where she is sole; all these, and such like grants, are good; for in this case, the rule doth hold *utile per inutile non vitiatur*. ^f And if one be baptized by one name, and after confirmed by another; yet a grant to him by his first name is good. And so also some think of a grant to him by his second name. *Sed Quere* of this. Also when a bastard hath gotten the name by reputation, a grant may be made to him by that name, and it is good.

If a grant be made to *W.* at *Stile*, by the name of *W.* at *Gappe*; this is a good grant, notwithstanding this mistake.

Incertainty.

But where a grant doth intend to describe the person of the grantee by his proper name, and doth omit or mistake his christian name or surname; in this case, for the most part, the grant is void, unless there be some special matter to help it, as in the cases before. And yet if the grant do not intend to describe the grantee by his known name, but by some other matter, there it may be good by a certain description of the person, without either surname or name of baptism. And therefore a grant to the wife of *I. S.* or *primogenito filio*, or to the second son, or to the youngest son, or *seniori puero*, or *omnibus filiis*, or *filibus* *I. S.* or *omnibus liberis* *I. S.* or *omnibus exitibus* *I. S.* or to the right heirs of *I. S.* or to the next of blood of *I. S.* in these cases, grants made to these persons, in these words, are good; for the person is certainly enough described. And if a lease be made to *I. S.* for life, the remainder to him that shall come first to *Paul's* such a day, or to him that *I. S.* shall name in three days; if, in these cases, any one doth come to *Paul's* that day, or be named by *I. S.* within three days, and the particular estate doth so long continue; this is a good grant of the remainder. *Id certum est quod certum reddi potest*. But if a grant be made ^{*} in these words, *viz.* To four of the parishioners of *Dale*; or *Deo & ecclesie de D.*; or to two of the sons of *I. S.* and he hath many sons; or to *I. S.* or *W. S.* in the disjunctive; these, and such like grants as these, are utterly void for uncertainty. And if a gift or grant of goods be to the parishioners of *Dale* in these words; it seems this is good; but if a grant or gift of land be made to them by these words, it seems this is void. And so also it is of a grant of goods to the churchwardens of a parish; this is held to be good; but otherwise it is of a grant of land to

Co. super Lit.
3.

^a] Bro. Nome

9.

^b] Bro. Confir-

mation, 30.

^c] Co. 6. 65.

27 E. 3. 85.

^d] Co. super

Lit. 3.

^e] Dier 119.

^f] Co. super

Lit. 3.

9 E. 4. 43.

Fitz. Grant,

23.

Co. super Lit.

3. Perk. sect.

54. Bro. Grant.

65. Done. 17.

Dier 337.

Perk. sect. 55,

56. Bro. Don.

31. Grant. 174.

Done 50. Fitz.

Done 1. Perk.

sect. 55. 52.

* P. 237.

to them. A bastard is capable by that name whereby he is usually called; and therefore a grant to him by that name is good. And a right heir, or one that shall be the first issue of *J. S.* that hath no child, is capable of a remainder (*r*) by that name, but of land in possession he is not capable by that name (*s*). And a bastard, as the reputed son of *I. S.* may take by a grant to *I. S.* and his issue. A bishop may take by the name of a bishop without any other name. But if a grant be made to the parishioners or inhabitants of *Dale*, or *probis hominibus de Dale*, or to the commoners of such a waste, or to the lord and his tenants bond and free; these are not good grants; for albeit these persons are capable, yet are they not capable by these names.

Doct. & Stud.
94. Co. 1. 15.
super Lit. 231.
New terms of
the Law, 251,
252. 5 E. 3.
17. Co. super
Lit. 21.

If there be two grantees, and one of them doth take by the deed, it is sufficient; but if the grant be to one that is no party to the deed, and not to the grantee himself; in this case, albeit the grantee and he to whom the grant is made be capable and never so well described by their names, yet is the grant void; for no grant can be made but to him that is party to the deed, except it be by way of remainder. And therefore if a man make a lease for term of life, and after the lessor grant to a stranger that the tenant for life shall have the land to him and his heirs; this grant is void. *Et sic de similibus*. And yet it seems in some cases, if one of the grantees be party to the deed, that another grantee that is no party to the deed may take with him. And therefore the case was. *Robert* gave the reversion of lands which *Agnes* his wife did hold for her life to *Stephen de la Moor*, *habendum post mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejusdem Roberti*; in this case it was adjudged, that albeit *Joan* were not named before the *habendum*, yet that she should take in tail with her husband (*t*).

Touching this point these things are requisite. 1. That the thing whereof the grant is made be grantable, and that both in respect of the nature of the thing itself, and also of his estate that doth grant it; for in some cases, albeit the thing for the quality of it be grantable, yet in respect of the estate and property that the owner hath in it, it is not grantable. 2. That if it be by deed, it be sufficiently distinguished and named.

Amongst things that are grantable, some are grantable *de novo* * and in their first creation, but not transmissible

4. In respect of matter touching the thing granted, charged, &c.

* P. 238.

(*r*) If it is a remainder for an estate of freehold or inheritance, it must be supported by an estate of freehold otherwise it would be void *ab initio*.

(*s*) See the case of *Goodright v. White*, 2 Bla. Rep. 1010. where a limitation to the heir of *I. S.* was held, on the ground of evident intention, to give an immediate, present estate, and not a contingent one, to the person who was heir apparent of *I. S.* See also the case of *Long v. Beaumont*, 1 P. W. 229. But these cases arose upon wills, and perhaps the same latitude of construction would not be allowed in the case of a deed; though, if certainty of description (or sufficient identity of the party) is all that is requisite in a deed as well as in a will, (and it is conceived that in such a case as the above, nothing more is necessary); then there seems no reason why such a limitation should not be good in a deed as well as in a will.

(*t*) See *supra*, page 75, note (a), on the subject of limitations to persons not parties to the deed, or to persons named in the *habendum*, and not in the premises.

1. In respect of the nature of the thing granted: and what things are grantable over or chargeable: or not.
1. In respect of the nature of the thing itself.

nor assignable afterwards. And some are grantable at first in their original creation, and assignable over afterwards from man to man *in infinitum*.

All things that may be granted by fine, and whereof a fine may be levied, may be granted over from man to man.

See Fine, Numb. 6. part 3.

All the things that are before observed to be grantable by or without deed are grantable over from man to man. And therefore all corporeal and immoveable things that lie in livery, as manors, messuages, cottages, lands, meadows, pastures, woods, and the like, are grantable in fee-simple, for life, or years at first, and assignable over again at the pleasure of the grantee. Also trees, and emblements are grantable. And a man may grant the vesture or herbage, *i. e.* the grass of his ground and not the ground itself. And a man that is seised in fee of a house may give or sell the timber, stone, &c. of the house, and the donee or grantee may take it after the death of the donor.

See in exposition of the terms of Grants, *supra* cap. 5. Numb. 15. Bro. Donec 10.

Rent, services.

Also all incorporeal things that lie in grant, as rents, services, and the like, are grantable over in fee-simple, for life, or years, and therefore rents or services reserved upon any estate, and rents granted out of lands, are grantable over *in infinitum*. And if a man have a rent reserved on a particular estate he may grant over parcel of it. But a rent or service suspended cannot be granted. Neither can a man grant a rent issuing out of a rent. If a rent be granted to me I may grant it over to a stranger before I be seised of it; and this grant is good. But an annuity it seems is not grantable over after the first creation of it (*u*). And yet if an annuity be granted to *I. S.* and his assigns *pro consilio*; it seems this annuity is grantable over. Advowsons are grantable in fee-simple, for life, or years, from man to man *in infinitum*. Also the presentation to a church before the church is void, is grantable; but when the church is void, that turn is not grantable, for it is then in the nature of a thing in action (*w*). Also rectories, and tithes, and portions of tithes, and pensions are grantable from man to man *in infinitum*.

Perk. sect. 103. Bro. Grant, 3. 3 H. 6. 20. 9 H. 6. 12. Perk. sect. 91. 87. 101. Fitz. Grant, 145. Co. super Lit. 144.

Advowsons, &c.

Stat. 32 H. 8. cap. 7. Perk. sect. 90.

Reversions and remainders.

Reversions and remainders are grantable from man to man in fee-simple, fee-tail, for life or years. And if I have a tenancy for life of three houses; I may grant the reversion of two of them. And if I have the reversion of three houses and four acres of land; I may grant the reversion of two houses and of two acres of land. And if tenant in tail be of an acre of land the remainder to his right heirs, he may grant over this remainder by itself; and yet it is such a thing as the tenant in tail himself may bar by a common recovery. But if a grant be of land to *I. S.* for years, the remainder to the right heirs of *I. D.* and *I. D.* is living; this remainder is not grantable so long

Perk. sect. 73. 88. 87.

(u) An annuity (unless the grantee is expressly restrained from assigning) may now, in most cases, be considered as assignable. See *Thomas's Co. Litt.* 1. 449. n. 9.

(w) And if the advowson should be granted during the vacancy, such grant would not include in it the right to present to the vacant benefice. See *Cro. Eliz.* 311. and see *Greenwood v. The Bishop of London*, 1 Marsh. 301.

Perk. sect.
103. Per two
Judges against
one, Hil. 16
Jac. B. R.

as *I. D.* doth live (*x*). Commons of pasture, of turbary, of fishing, of estovers, are grantable in fee, for life, or years, from man to man in *infinitum*. And yet if a common in gross and without number be granted to a man and * his heirs; it seems this is not grantable over to another man (*y*). But if common for a certain number of beasts be so granted, it seems the law is otherwise, and that this is grantable over in case where the first grant is to the grantee only, and not the grantee and his assigns.

Common.

* P. 239.

Perk. sect.
101.

Offices are grantable at first; but the great judicial offices of the kingdom, as the offices of the lord keeper, chief justices, or chief baron, or of other of the justices or barons, and such like, are not grantable over to others, neither may they be executed by deputies (*z*). But the sheriff's office, albeit it be not grantable over, yet may it be executed by deputy (*a*). The reversion of an office is not grantable by a subject as it is by the king (*b*), yet a subject may grant an office *habendum* after the death of the present officer; and this is good. The inferior offices also that are offices of trust, especially if they concern the person of the grantor, howsoever they are grantable at first, yet are they not grantable over by the officer to any other, unless they be granted to them and their assigns, and of this sort are the offices of steward, bailiff, receiver, sewer, chamberlain, carver, and the like; neither may these be executed by deputy but where the grant is so (*c*).

Offices.

Prerogative.

Per Lord
Keeper & 3
Ch. J. M. 5
Car. in Can-
cellaria. Co.
super Lit. 233.
Perk. sect.
101.

12 E. 7. 25.
13 H. 7. 13.

Licences, and authorities, are grantable at first for the lives of the parties or for years. But the grantees of them cannot assign them over. And therefore if power be given to me to make an award or livery of seisin; I may not grant over this power to another. And if licence be granted me to walk in another man's garden, or to go through another man's ground; I may not give or grant this to another.

Licences, au-
thorities, &c.

(*x*) This being a contingent remainder, and having no estate of freehold to support it, is void *ab initio*; and therefore can no more be grantable after *I. D.*'s death, than in his life-time.

(*y*) 2 Roll. Abr. 45. *contra*. A common without number in fee is grantable to another, 18 E. 4. 84. for the word "heirs" implies "assigns."

(*z*) The act of the 5th & 6th Edw. 6. c. 16. prohibits the assigning, or granting over to others, all offices which concern the receipt of the king's revenue or the administration of justice. On this subject, see *supra*, page 149, note (1).

(*a*) Wherever one office is incident to another, such incident office cannot be separated from the principal office; and therefore it was held that the king's grant of the office of county clerk was void, it being inseparably incident to the office of sheriff. 4 Co. 33.—In like manner, the office of chamberlain of the King's Bench is inseparably incident to the office of marshal; and therefore a grant of the office of marshal, with a reservation of the office of chamberlain, is void. Per Holt, C. J. 2 Salk. 439.

(*b*) See the acts of the 50 Geo. 3. c. 88. and 52 Geo. 3. c. 40. restraining the granting of certain offices in reversion.

(*c*) See accordingly Br. Abr. Deputy, pl. 9. The office of filazer is not grantable or assignable over because it is an office of trust. Vin. Abr. Grants (H. 1.) pl. 4.—See more amply who may assign his office. Com. Dig. Office (C.)—by whom offices shall be granted.—Vin. Abr. Offices (A.)—as to the grants of offices by ecclesiastical persons, see Bac. Abr. Offices (D.) and 1 Burr. 219, the case of *Sir John Trelawney v. Bishop of Winchester*, where the Court were unanimously of opinion, that an office and fee, which existed before the first of Eliz. is not within the statute of 1 Eliz. c. 19. but may be granted *since*, precisely in the same manner in which it was granted *before*.

A bare.

Possibilities.

A bare possibility of an interest which is incertain is not grantable. And therefore if one have a term of years in land, and by his will devise it to *I. S.* for his life, and afterwards to me for the residue of the years; or devise it to *I. S.* if he live so long as the term shall last, and if he die before the term end, the remainder to me; in these cases, so long as *I. S.* doth live, I cannot grant over this possibility (*d*). So if a lease be made to me and my wife for life, the remainder to the survivor of us; I may not grant this remainder over to another man (*e*). But such a possibility being coupled with some present interest is grantable over. And therefore if *A.* have four houses in execution upon a statute, and by course of time it will endure thirteen years, and after two of the houses are evicted by *elegit* for fifteen years; in this case he that hath this execution upon the statute may assign over his interest in these two houses, for after the execution by the *elegit* is satisfied, *A.* shall have the two houses again until he be satisfied. The lord cannot grant the wardship of the heir of his tenant whilst the tenant is living.

Co. 4. 66. 5.
24. Dier 244
Co. 10. 51.

Perk. sect. 90.

* P. 240.
Incidents.

Those things that are inseparably incident to others, are not * grantable without the thing to which they are so incident and belonging. And therefore a court baron, which is evermore incident to a manor, is not grantable without the manor itself: common appendant to land, is not grantable without the land itself to which it doth belong: and common of ostovers appendant to a house, is not grantable without the house itself to which it doth belong.

1 E. 4. 10.

Perk. sect.
104. 5 H. 7. 7.

Suspended
things.

A rent, service, or other thing, whilst it is wholly in suspense, is not grantable. And therefore if the lord dis-
seise the tenant or the tenant infeoff the lord upon condition; the lord cannot grant over the seigniorship during this suspension. But if one have a rent in fee out of my land, and he purchase the same land for life or years; in this case, it seems the rent is grantable even whilst the estate of the land doth continue. So if the tenant make a lease for years or life of the tenancy to the lord; in this case, the lord may grant the seigniorship notwithstanding. And yet if the tenant make a lease to another man for life, and the lord grant the seigniorship to this tenant for life in fee; in this case, it seems the grantee of the seigniorship cannot grant it over, because it was never in *esse*.

16 H. 7. 4.
Co. super Lit.
314. Bro.
Grant, 175.
Perk. sect. 88,
89.

Franchises.

Franchises, as views of frank pledge, perquisites of courts, leets, conusance of pleas, fairs, markets, goods of felons, waifs, estrays, hundreds, ferries, or passages, warrens, and the like, are grantable over from man to man, in fee, for life, or years, *in infinitum* (*f*).

(*d*) These possibilities or vested remainders in terms of years, or other chattel interests are every day assigned, and no doubt is entertained of the validity of such assignments. And there is, it is conceived, great reason to contend, that even *contingent* interests in terms of years and other chattel interests may be transferred *at law*. See Treatise on Marriage Settlements, page 54.

(*e*) See last note.

(*f*) If the King grants liberties to *J. S.* he cannot grant them over. Nor he who has liberties in gross by prescription, as a hundred, &c. cannot grant them over. Br. Abr. Franchises, pl. 38. cites 6 E. 2.—See further in Vin. Abr. Franchises (A. 2.) See more amply as to the nature of franchises and their incidents, and therein more particularly as to the privileges of a county palatine, the cinque ports, and corporations, in Com. Dig. Franchises. 2 Bl. Com. 37. Wood's Inst. 205.

- Co. 5. 24. 10. * Things in action, and things of that nature, as causes of Things in ac-
 48. Co. super tion.
 Lit. 214. suit, rights and titles of entry are not grantable over to
 Dier 244. strangers but in special cases. And therefore if a man
 Perk. sect. have disseised me of my land or taken away my goods; I
 86, 87, 85. may not grant over this land, or these goods, until I have
 Bro. Done 27. seisin of them again. Neither can I grant the suit which
 24. 28. Co. 6. the law doth give to me for my relief in these cases to
 50. another man. So if I make a feoffment to another man,
 on condition that if I do such a thing, I shall have the
 land again; in this case I may not before or after the time
 of performance of the condition grant over the condition
 to another. But all these things I may release to the parties
 themselves, for it is a maxim in law, that every right,
 title, or interest in *presenti* or in *futuro*, by the joint act
 of all them that may claim any such right, title, or interest,
 may be barred or extinguished. And in some cases a
 grantee of a reversion may take advantage of a condition
 annexed to an estate for life or years. If a man owe me
 money on an obligation, or the like; I cannot grant this
 debt to another; but I may grant a letter of attorney to
 another man to sue for it and receive it, or I may grant
 the writing itself to another, and he may cancel it or give
 it to the obligor. A presentation to a church, after the
 church is become void, is not grantable, for it is in the
 nature of a thing in action. And if a man take my goods
 from me, or from another man in whose hands they are,
 or I buy goods of another man and * suffer them [to remain] in his possession, and a stranger taketh them from
 him; it seems in these cases, I may give the goods to the
 trespasser, because the property of them is still in me (g). * P. 241.
- See condition.
 Co. super 232.
 Perk. sect. 86.
- Dier 283.
- Perk. sect. 92.
 Fitz. Done 3.
 7.
- Perk. sect. 99.
 Plow. 379.
- Plow. 393.
- Fitz. Grant 19.
 76.
- Perk. sect. 94.
- Trusts and confidences, which are personal things, for Personal
 the most part are not grantable over to others. And hence things.
 it is also that offices of trust and confidence are not grant-
 able over but in some special cases where they are granted
 to a man and his assigns; or where they are granted to a
 man and his heirs. And hence it is also that a wardship
 by reason of a term in socage, which by the law is given
 to the next of kin, is not grantable over to any other person
 by the guardian in socage.
- Some things are so entire that they cannot be severed by Entire things.
 grant. And therefore if a man hold three acres of land
 of me by twelve pence rent, and I grant the services of
 the third acre, this is void; and he shall have all or none,
 for I cannot sever the tenure. But if a man hold land of
 me by homage, fealty, escuage, and a certain rent; in
 this case I may grant the rent and keep the seigniority.
- A villain is grantable for life, or years; and if the villain Villains.
 during the estate of the grantee, purchase land in fee, the
 grantee shall have it for ever as a perquisite albeit he have
 but an estate for life in the villain itself (h).

(g) As to a grant or assignment of *choses in action*, see *supra*, page 98, note (q). and see further Vin. Abr. Assignment (B.) (D.) Grant (G.) Bac. Abr. Grant (D. 1.)

(h) Yet the villain may purchase some kind of inheritances in fee-simple, which the lord of the villain cannot have; as a common *seignior* number, a corrody, &c.—Co. Lit. 117. a.—For the doctrine of villenage see Co. Lit. 116 to 141.—Mr. Hargrave's argument in *Somerset's case*, and Mr. Estwick's considerations on that case.

Chattels real
and personal.

All chattels real and personal, regularly are grantable from man to man in *infinitum*, as leases for years, be they present or future, wardships of tenants in *capite*, or by knight's service, trees, oxen, horses, plate, household stuff, and the like. Also trees, grass, and corn, growing and standing upon the ground, fruit upon the trees, wool upon the sheeps back, is grantable.

Dier, 58. Plow.
142. 147.
Perk. sect. 91.
Dier, 305.
Perk. sect. 90.

Distress.

If a man sell me ten load of wood in his wood to be taken by his assignment; or sell me three acres of wood towards the north side of the wood; by this grant, in these words, I have such an interest as is grantable over. If I make a lease by deed of a house to another, and therein it is agreed between us, that if the rent be not paid me by such a time I shall enter into the house, and take and sell the goods there as mine own to pay the rent; it seems this is a good grant of the goods, and that I may do according to the agreement. And if one that doth hold land of me, grant to me by deed indented that I shall distrain for my service in all his land, this is a good grant.

Co. 5. 24.

Fitz. Barre,
280.

Fitz. Grant, 6.

Money.

A man may give or grant money, as, if I deliver one money, on condition that if he assure me of such land, he shall have it, otherwise that he shall re-deliver it to me again, in this case, if he make the assurance he shall have the money, if not, I may have an account for it.

Fitz. Done, 11.

Fera natura.

Such things as are *fera natura* as conies, hares, deer, and such like, are not grantable at all (i).

Bro. Dome, 34.

Tithes.

A parson of a church may grant his tithes for years, and yet they are not in him (k).

Perk. sect. 90.

Deeds.

* P. 242.

A man may give or grant his deeds, i. e. the parchment, paper and wax * to another at his pleasure, and the grantee may keep or cancel them. And therefore if a man have an obligation he may give or grant it away, and so sever the debt and it. So tenant in fee-simple may give or grant away the deeds of his land; and the executor in the first case, and the heir in the last case, hath no remedy. But a tenant in tail of land cannot give or grant any of the deeds belonging to the land intailed no more than the land itself. One may give or grant apparel, and it is said if one make apparel for another, and put it upon him to use and wear, this is a gift or grant of the apparel itself (l).

Co. super Lit.
232. Trin. 38
El. B. R. 25
H. 8. 5. 1 H.
7. Dove's case.

Apparel.

1 H. 4. 31.
Fitz. Barre
179.

(i) A man may be invested with a qualified, but not an absolute property, in creatures that are *fera natura*, 1. Either *per industriam*, by reclaiming and making them tame by art, industry, and education; or by so confining them within his own power that they cannot escape, and use their natural liberty:—2. Or *propter impotentiam*, on account of the inability of the animals, as when birds build in my trees, or conies breed in my ground:—3. Or *propter privilegium*, where a man has the privilege of hunting, taking, or killing animals in exclusion of other persons.—2 Bl. Com. 391.—See further as to the nature of property in animals *fera natura*, and what remedy may be had against persons unlawfully destroying or stealing them, in 1 Hal. Pleas of the Crown, 512.—1 Hawk. Pl. c. 94. cap. 33. and Vin. Abr. tit. *Fera Natura*.

(k) A parson cannot grant his tithes for longer than his own life, unless the grant is confirmed by the patron, bishop, and ordinary. But see further on this subject in the chapter on Leases.

(l) Not, it is conceived, unless such was the intention.—In the case of livery servants the master, it is conceived, may resume the livery.

Perk. sect. 90. If one grant to another all the wool of his sheep for seven years; this is a good grant (m).

Fitz. Grant 40. If one being a parson give to another all the wool he shall have for tithe the next year; this is a good grant (n).

Bro. Done, 19. If one grant to another his horse or his cow in the disjunctive; this is a good grant notwithstanding this uncertainty, and the donee shall have election and by that make the grant good (o). Incertainty.

Any estate that a man hath in fee-simple, fee-tail, for life, or years, in any lands, &c. or any rent, or profit apprender out of the same, is grantable from man to man *in infinitum*. And he that hath any such estate of any lands may charge it with any rent or profit, to be taken out of it, as long as the estate of the land doth last. But an estate at will is not grantable over (p). And if an estate be made to a man and his heirs without the word *assigns*, yet he may assign it at his pleasure, for assigns is included within heirs.

2. In respect of the estate, property, and possession of the grantor.

22 E. 4. 37. An *Interesse termini*, i. e. a lease for years to commence in *futuro*, is grantable before the term doth begin; whether it be a lease of the land itself, or any rent or other profit out of it.

Perk. sect. 91. The interest or estate, that a man hath by extent is assignable from man to man at pleasure.

Co. 4. 64. The reversion upon an estate tail is grantable: and yet the tenant in tail in possession, by the suffering of a common recovery, may bar him in reversion of any fruit of it.

Co. 6. Sir G. Curson's case, Co. 1. Alton-wood's case. If an estate be made of land upon condition, as, if A. make a feoffment to B. on condition that if A. pay twenty pounds he shall have the land again; in this case, A. and B. together may at any time before the performance of the condition join together and grant this land, or charge it with any rent, &c. and this will be good; for it is a maxim in law, fee-simple land may be charged one way or other. And in this case, B. may grant over his estate alone; but it will be subject to the condition. And if B. grant a rent out of the land to a stranger, and after the condition is performed and the feoffor enter; in this case he shall avoid the rent. But in this case A. cannot grant; for he hath

(m) A man cannot grant a thing of which he is not the owner, either *actually* or *potentially*, at the time of the grant; that is, he must either be possessed of the very thing granted, or he must be possessed of something from which the thing granted may arise or proceed. Thus he must be either possessed of wool severed from the sheep, (which is a case of *actual* ownership) or he must be possessed of the sheep from which the wool is to arise for the ensuing seven years, which is a case of *potential* ownership: therefore where the grantor has neither an actual or potential ownership at the time of the grant, such grant is void—as if a man grants all the wool that shall grow upon the sheep he may buy hereafter, this is a void grant. See *Grantham v. Hawley*, Hob. 132. But in certain cases a grant may become good where the grantor has neither an actual or potential interest at the time of the grant, as if he grant a lease, by indenture, of lands in which he has no interest, and afterwards purchases the lands, the lease will become good by way of estoppel. But this will be more fully noticed in the chapter on Leases.

(n) That is, if it is the tithe wool of a living of which he is actually then the incumbent.

(o) See accordingly 1 Wood. 668, 9. and further what things may be granted, Vin. Abr. Grants (D). Com. Dig. Grant (C).

(p) Query, and see the case of *James v. Deane*, 11 Ves. 383.

nothing

nothing but a possibility (*q*). If one infeoff divers to the use of his son and heir upon condition, and before the time of performance of the condition the father and son join to grant or charge the land, this is a good grant or charge.

P. 243.

If the tenant in tail, and he that is next in remainder in fee, join in the grant of a rent charge in fee, and after the tenant in tail doth die without issue; in this case this is a good grant and charge against him in remainder (*r*). And if A. doth bargain and sell land to B. by indenture, and before enrolment they do join to grant a rent charge to C. by deed; in this case this is a good charge and grant, whether there be any enrolment or not. And so if donor and donee in tail grant a rent charge out of the land, and then the donee die without issue; in this case, the grant is good to bind the donor (*s*).

Co. super Lit.
45. Co. 10.
48, 49.

If land be granted to two men and to the heirs of their two bodies begotten; in this case, albeit they have several inheritances after their death, yet neither of them can grant away his estate after his life; for they are divided only in supposition of law.

Co. super Lit.
189.

One coparcener of a seigniorie may grant his part to a stranger.

Perk. sect. 73.

If two joint-tenants be of a plow land, and one of them doth grant to a stranger common of pasture for beasts without number, to be taken in the same land; this is void.

Perk. sect.
103.

Joint-tenants.

If two joint-tenants be of a reversion, and one of them grant the whole, this is void for a moiety. If a man grant or charge that which is none of his, and that wherein he hath no property, it being in the grantee, or a stranger; the grant is void. And therefore if a man grant a rent-charge out of the manor of *Dale*, or grant a reversion of land, and in truth the grantor hath nothing in the manor of *Dale*, or in the land; in this case the grant is void. And albeit the grantor doth afterwards purchase the manor, or the land, yet this will not make the grant good. But if the grant be by fine, or by indenture, there in some cases it shall be good by way of estoppel (*t*). And in this case, albeit the party recite that it is his own, yet this will not mend the case. And therefore if a man recite that he hath a rent of ten pounds a year, and then grant five pounds a year parcel of it; in this case, if he have no such rent the grant is void.

Perk. sect. 80.
Perk. sect. 63.
Dier, 12. 33.

Estoppel.

(*q*) Query of this, it being a possibility coupled with an interest? And see *supra*, page 239, note (*d*). If a person seised in fee makes a lease for years upon condition, and afterwards grants away the reversion, the grantee of the reversion shall in some cases have the benefit of the condition: see *supra*, page 140, note (*y*).

(*r*) When tenant in tail in remainder makes a grant of the estate, this grant is not void by his death, but only voidable; otherwise it is of a thing granted out of an entailed estate, as of a rent granted out of land intailed; this grant is void by the death of the grantor (tenant in tail), and the same cannot be made good after.—Arg. 1 Buls. 32. *Walter v. Bould*.

(*s*) That is, to bind any interest which remained in the donor after making the gift in tail.

(*t*) It would appear that an indenture will not operate as an estoppel in the grant of an estate of freehold; but it will in the case of a demise for a term of years. See Chapter on Leases.

A shepherd,

Bro. Done, 56. 4. A shepherd, bailiff, or parker, cannot give or grant Servant away the goods of his master without authority. And yet it seems the servant of a taverner or mercer may give or grant his master's wine or wares (w). And if a wife give Husband and or grant the goods of her husband; this is a good gift or wife. grant until the husband disagree to it, and by his agreement it is made good for ever.

Plow. 524, 525. If a man have a lease for years of land, and make a lease for life of it, or charge it for longer time than the lease for years doth last; in this case, the grant is good for so long as the lease for years doth last and no longer. But if he make a lease for life and give livery of seisin, he doth forfeit his estate.

Co. super Lit. 214. Perk. sect. 65, 86. Regularly a man cannot grant or charge that which is not in his own possession, albeit, he have a right to it: and therefore if a man be disseised of his land, and before he hath entered into or * recovered the land, he doth grant or give the land, or his right to the land, to a stranger, or grant a rent-charge out of the land to a stranger; in these cases, the grants are not good. And yet such

* P. 244.

Perk. sect. 92. Estoppel. 92. Co. super Lit. 46. grants by fine may be good by way of estoppel (x). And by a release also the right may be extinct. But if one hath a reversion upon an estate for life, and he grant a rent issuing out of this land; in this case the grant is good, and the charge shall fasten upon the land after the estate of the tenant for life is ended. And if a man grant common, or rent, notwithstanding that a stranger take the rent or use the common at the time of the grant, yet this grant is good; for a man cannot be out of possession of these things but at his pleasure. And if a lease for years be made to me, I may grant away my estate before my entry. And if the lease be to begin at a day to come; I may assign over my interest before the day come; for in this case the interest is in me from the time of making of the lease. Also I may give or sell my goods that I have not in possession; and therefore if a man take my goods out of mine or another man's possession, I may afterwards give or grant these goods to him or another man, and this grant or gift is good.

Perk. sect. 92, 93. Fitz. Done, S. Bro. Done, 13. Dier 90. 30. Co. 4. 62. 63. Dier 305. 20 H. 6. 22. Perk. sect. 59. Co. 11. 50. A lessor cannot give or grant the trees growing on the ground of his lessee for life, or years, without the licence of the lessee; except they be first cut down by the lessee or some other, for then he may. And if there be lessee for life, and the lessor give the trees growing on the ground, and after the lessee for life dieth; in this case the donee cannot take them; for that at the time of the gift a property of them was in the lessee. But if a tenant in fee-simple give or grant the houses standing, or trees growing, on the ground he hath in his possession; in this case, the grantee or donee may take them after the death of the grantor; and that, albeit they be not cut or taken down before his death. And yet if the tenant in tail,

Tenant for life.
Trees.

Tenant in tail,

(w) See accordingly Vin. Abr. Grants (H. 9.) pl. 4.

(x) It is said that a fine of lands by a disseisee to a stranger, operates for the benefit of the dis-
seisor, and not of the conusee: see *supra*, page 14, latter part of note (t).

give

Emblements.

give or grant the trees growing upon his intailed land, and the donor die before the trees be cut; in this case, the donee or grantee cannot cut them afterwards. Howbeit if such a tenant in tail give or grant his emblements of corn growing on the ground; the donee may cut and take them after the death of the tenant in tail (y). And if the tenant in tail give or grant his trees, and die before they be cut, and afterwards, before the issue in tail enter into the land, the donee or grantee cut them and take them away; in this case, the issue in tail can bring no action of trespass against the donee, or grantee, for the trees: but perhaps, if the trees be not removed off the ground, he may take them (z).

Presentation.

If two coparceners be of an advowson, and the one doth present, and then he doth grant the next presentation; this is a good grant, but by this grant doth pass the next he hath to grant, for his companion must have the next (a). So if one be seised in fee of an advowson, and he hath a wife, and he grant the third presentation; this is a good grant, but it shall be taken for the third he may grant, which is the fourth, for the wife is to have the third for her dower.

Dier, 35.
15 H. 7.

• P. 245.

3. In respect of a former grant of the same thing.

If a man have granted a thing once, he cannot afterwards grant it again (b). And therefore if a man give or grant me a horse first by word of mouth, and after grant him to me by deed; this second grant is void; and therefore, if there be any fault in this grant in writing, it is not material. And if a man grant to me common of pasture without number in his ground, and after make the like grant to another; this second grant is void as to me, albeit it be good against the grantor. And if one grant the next presentation to a church after the death of the present incumbent, and after grant the same to another; or make a lease of land to one for ten years, and after make a lease of the same land to another for the same ten years; or give a horse to one, and after give the same horse to another; in all these cases, the second grant is void. But if the first grant or gift be only of part of the thing granted afterwards, or of part of the time only, the second grant

Perk. sect.
Dier, 35. 350.
Lit. Bro. sect.
298. Perk.
sect. 102.

(y) And where there is no grant of them, if tenant in fee, or in tail, die after sowing the corn, and before severance, his executor or administrator shall have the emblements as the chattels of the testator. So every one who has an uncertain interest, if his estate determines by the act of God before severance of the corn, shall have the emblements, or they go to his executor or administrator. Co. Lit. 55. b.—See fully as to the nature of emblements, and who shall have them—2 Bl. Com. 122. 403.—Com. Dig. (Blens G.)—Vin. Abr. Emblements (A.)—3 Atk. 16.—and as to a devise of them, see the chapter on Testaments.

(z) It is conceived that if the grantee cut them after the death of the tenant in tail, though before the entry of the issue in tail, that the issue might maintain a special action on the case, or perhaps an action of trover.

(a) Parceners seised of an advowson may join in a presentation: but if they cannot agree to present, the law gives the first presentation to the eldest; and this privilege shall descend to her issue, and her assignee shall have it; and so shall her husband, who is tenant by the curtesy.—Co. Lit. 166. b. 186. b. See more amply in Com. Dig. Eglise (H. 3)—Vin. Abr. Presentation (G. a.) In the case of joint-tenants or tenants in common of an advowson, if they cannot agree in presenting, the ordinary, after six months, may present by lapse. And see further on the subject, 1 Thomas's Co. Litt. 735.

(b) A second grant of the same thing to the same person by the same person, and reciting the former grant, must not be pleaded as a grant, but as a confirmation. Plow. Com. 397.

will

will be good for the overplus. And therefore if one be seised of a manor, and demise ten acres of the demesne to one for ten years, and after demise the whole manor to another for twenty years; this is a good grant for the overplus of the manor besides the ten acres, presently; and for the whole manor, for the last ten years. So if the second grant be to begin after the first is determined; it is good. And if the second be such as may be satisfied and not impeach the former, both shall stand good. And therefore if one that hath an advowson, grant the next presentation to one, and after he doth grant the next presentation to another, and doth not say [after the death of the incumbent;] in this case the second grant is good, and the grantee thereby shall have the second avoidance after the death of the present incumbent (c).

By the grant of an acre of land or of any other thing, by the name whereby it is called, the reversion of that thing, if the grantor have no more but a reversion, will pass, and this mistake will not hurt. But it is not so *à converso*. * And yet some have said, if one grant a thing in possession, by the name of the reversion of the thing, this is good to pass the possession. *Quod non est lex*. ^b For if one make a lease for years, and before the lessee enter, the lessor grant the land by the name of the reversion or the land; this grant is void (d). If one make a lease for life of the demesnes of a manor rendering rent, and after he doth grant the manor by the name of the manor; this is a good grant for the reversion of the demesnes, as well as for the residue of the manor. But if one grant common, by the name of the reversion of the common, it seems this is not good. And yet if one have common and grant it for life, and during that * estate he doth grant the common by the name of *totam illam Communiam suam*, &c. some do hold this grant to be good.

Any thing may be granted by the name whereby it is and hath been usually called of latter times, within nine or ten years or thereabouts, albeit it be an improper name, and not the ancient name of the thing, but a name newly gotten (e). And so a manor may pass by the name of a messuage or farm, or a farm or manor by the name of a messuage, if it be so usually called and reputed (f). So

4. In respect of the naming or description of the thing granted. Misnaming or misrecital.

* P. 246.

Co. 4. 122.
Perk. sect.
114. 116. Co.
10. 106, 107.
11. 47.
*] Plow. 190.

*] Co. super
Lit. 46. See
also Co. 2. in
Lane's case,
which doth
seem to war-
rant this opi-
nion also. Dier
the grant is
good in a
common per-
son's case, Bro.
Grant.

Co. 6. 65.
45 E. 3. 6.
Bro. Grant, 7.
Perk. sect.
116.

(c) According to the rule of construction, *Ut res magis valeat quam pereat*.

(d) But if the instrument could take effect either as a bargain and sale, or in any other way as the conveyance of an estate in possession, in that case, it is conceived, it would be good.

(e) Where an estate has undergone any material alteration, so that the same description as that which is contained in the last conveyance, would not clearly identify the property, in such a case it should be conveyed both by the old description and by it's modern one; and after the old description the modern one should be prefaced by words to the effect following, viz. "and which said messuages or tenements, lands and hereditaments, above mentioned and described, are, in consequence of certain alterations in the names, boundaries, and sub-divisions thereof, (or otherwise as the circumstances of the case may require) now better known by the description following, that is to say; all that," &c.

(f) A farm or lands which are only a manor in reputation, must be meant here, for, it is conceived, a real manor will only pass by the name of a manor. A manor in reputation, but which is not in truth a manor, does not pass by the name of a manor in a fine or recovery; for they are grounded on original writs, which ought to be certain, and not to be taken by intendment; but otherwise in a grant or feoffment, for there the intent of the parties shall help it. Noy, 7. *Johnson v. Heydon*, Br. Abr. Feoffment, pl. 14. see further 1 Lev. 27.

the

the great houses in *London* called *Exeter* and *Dorset* houses may be granted by those names. And if a man grant that which in deed is a pasture ground, by the name of a wood; or grant that which in deed is a wood, by the name of a pasture ground; and the things are called by those names; these are good grants of those things. And if one grant by the name of a great field, that which in deed is but a little close, but it is usually called by the name of a great field; this is a good grant of this thing. So if one grant by the name of a plow land, that which in truth is but an acre of land, or grant by the name of a manor, that which is but a plow land; these grants are good. And so it seems it is *et converso*. But if a man grant a house, or a message; by this grant an acre of land will not pass (g).

By the grant of services, a rent reserved upon an estate tail will pass.

Co. super Lit.
150. Mich.
7 Jac. Caria.
B. R.

If a man make a lease of one house to another for years, and the lessee divide it and make two houses of it, and after the lessor doth grant the reversion of it by the name of one house; this is a good grant to pass it. And if one lease three houses to three several men at several times, and they divide them into twenty-nine tenements and households in them all; and the first lessor doth grant them by the name of three messuages: this is a good grant to pass them all. But if he grant by the name of fifteen messuages or tenements only; it seems this is good for no more but for fifteen of the subdivided tenements (h).

If one recite that he hath a rent-charge issuing out of Black Acre and White Acre, and then grant the same rent, and in truth it doth issue out of Black Acre only; or if he do recite that it doth issue out of one acre when in truth it doth issue out of both; in both these cases the grant is good, notwithstanding these mistakes.

If one be patron of the church of *S. Peter* and *Paul* in *D.* and he grant the next presentation of the church of *S. Peter*, or of the church of *S. Paul*; these are void grants to pass the presentation.

Perk. sect. 72.
Bro. Grant, 12.
Perk. sect. 79.

If one grant a rent out of White Acre by the name of a rent out of Black Acre; this grant is void as to charge White Acre.

Per Chief
Justice Hat-
ton and Yel-
verton, Co. B.
Mich. 3 Car.
in the case of
Edward Crew.

• P. 247.

If one have a manor called *Steeple Lavington*, and he grant it by the name of *West Lavington* alias *Steeple Lavington*, it is a good grant by the [alias] * especially if the grant say [lying in *Lavington*] and the manor of *Steeple Lavington* doth lie in that parish, and the grantor hath no other land there.

If one grant all his lands which he hath in *D.* in this manner, [All my lands in *D.* which I had of the grant

Mich. 2 Jac.
in Brown's
case, agreed.

(g) Unless the grant was of the message with the appurtenances, in which case the acre of land might pass in certain cases. See *supra*, page 94: see also page 90, note (y).

(h) If a man make a lease of eight tenements in *D.* by several leases, and then by deed recite seven of the leases, and grant the reversion of them to *A.* with all his lands, houses, and edifices in *D.*, he having no other lands, &c. in *D.* than the eight tenements; in such a case the reversion of the eighth tenement not recited shall pass; for the words, "all his lands," &c. cannot otherwise be satisfied, 2 Roll. Abr. 49. *Hugget v. Giles*. But general words shall have no further operation than the parties clearly intended, see *supra*, page 79, latter part of note (n).

Plow. 169. 395.
And ~~it~~ was
the opinion of
Chief Justice
Popham,
2 Jst. B. R.

Dier 87.

Mic. 2 Jac.
Adjudged
Brown's case.

Dier 299. Co.
S. 10.

Hil. 2 Jac.
B. R. per
Tanfield.

Pasc. 7 Jac.
B. R.
Co. 2. 32.

of *I. S.*] this is a good grant of all his lands in *D.* albeit he had them not of the grant of *I. S.* but of the grant of another. But if the words be [all my lands which I had by the grant of *I. S.* in *D.*;] in this case the grant is not good to carry any other lands in *D.* but such as he had of the grant of *I. S.* So if one grant in this manner [all my manor of *Sale*, in *Dale*, which I had by descent] and in truth he had it not by descent but by purchase; this is a good grant of the manor. So if one grant all his lands in *Dale*, and say no more; this is a good grant to pass all his lands there. But if one grant in this manner [all my lands in *Dale* which I had by descent from my father,] and in truth I had them not by descent but by purchase, this grant is void and will not pass those lands. So if I grant in this manner [all my lands that I had by the attainder of *I. S.*] and in truth I had no land by that means; this grant is void. And if I grant after this manner [all my lands in *B.* in the tenure of *D.* which I had of the gift of *I. S.*] and in truth it doth lie in *B.* and is in the tenure of *D.* but it was not purchased of *I. S.* this is a good grant to pass the land.

If a parish lie in two counties, viz. *Berks* and *Wilts*, and one grant in this manner [all his close called *Callis* in the parish of *Hurst* in the county of *Berks*] and in truth the close doth lie in the county of *Wilts*; this is a good grant to pass the close. But if one grant in this manner [all his houses in the parish of *St. Botolph extra Aldgate*, late in the tenure of *R.*] and in truth he hath no houses there, but he hath some houses in *St. Botolph extra Aldersgate*; this is a void grant. And yet if the grant be in this manner, [all that my house in the occupation of *I. S.* in *St. Andrew's* parish] whereas in truth it is in the parish of *K.* but in the occupation of *I. S.* it seems this grant is good to pass the house. But if it be thus [all that my house in *St. Andrew's* parish in *Holborn*, in the occupation of *I. S.*] and in truth it is in another parish, but in his occupation; this grant is not good to pass the house (i).

If one grant in this manner [my manor of *Dale* which appeareth by office found to be of the value of ten pounds *per annum*] and in truth in the office it is found at twenty pounds *per annum*; this grant is good notwithstanding this misprision.

If one grant in this manner [all my manor of *W.* late parcel of the possession of the Abbot of *S.* and late in the

(i) See *contra*, *Lamb and Reaston*, 5 Taunt. Rep. 207. where it was held, that if parcels were correctly described by their quantities and occupiers, they would pass by the deed, notwithstanding they were erroneously described as to the parish. And in wills, partial errors in the description of the property will not vitiate the devise, if the description, independent of the erroneous part, is sufficient to shew with certainty, what property the testator really meant to devise. Upon this point, the following cases may be referred to: *Chamberlain v. Turner*, Cro. Car. 129. *Hastead v. Searle*, 1 Ld. Raym. 728. *Pacy v. Knollis*, Brownl. 131. *Inchley v. Robinson*, 3 Leon. 165. *Doe v. Earl of Jersey*, 1 Barnw. & Ald. 550. *Mosley v. Massey*, 8 East's T. R. 149. *Denn v. Twigg*, 1 P. Wms. 286. *Denn v. Keymes*, 9 East's T. R. 366. *Doe v. Pigot*, 1 Moore's Rep. 274. It may be proper just to state, that in devises, parol evidence is not admissible to shew, either directly, or by facts and circumstances from which the inference might be drawn, that the testator, by a particular description, intended to devise either more or less than such description comprises. See *Doe v. Oxendon*, 3 Taunt. 147. *Doe v. Geering*, 3 Maule & Selw. 271. *Doe v. Lyford*, 4 Maule & Selw. 550. In the case of *Whitbread v. May*, 2 Bos. & Pul. 593, the Court was divided as to the admissibility of such evidence, but it seems to be now settled, that it is not admissible.

* P. 248.

possession of *K.*] and in truth it was never in the possession of *K.* this grant is good notwithstanding. But if the grant be thus [*omnia illa terras, &c. * in tenura I. S. jacent. in W. nuper prioratus de S. spectant.*] and in truth the land doth lie in *S.* and not in *W.*; this is no good grant to pass the lands in *S.* And if the lands do lie in *W.* but are in the tenure of *I. D.* and not in the tenure of *I. S.* the grant is void to pass the lands in the occupation of *I. S.* (*k*).

If one purchase the land of *I. S.* in *T.* and have no other land there, and he grant his land in *T.* late the land of *R. S.* or late the land of *S.* and mistake or omit the christian name; this grant is good, notwithstanding this mistake. And so also it is where there is a blank left for the christian name. And if in this case he grant all his land in *T.* and say no more, this is a good grant to pass the land. And if one grant [all his lands in *D.* called *N.* which were the lands of *I. S.*] this is a good grant to pass the lands called *N.* though they were never the lands of *I. S.* But if the grant be [of all his lands in *D.* which were the lands of *I. S.*] by this none but those lands that were the lands of *I. S.* will pass.

Dier 376. Bro. Grant, 92.

If one grant in this manner [all my meadow in *D.* containing ten acres] whereas in truth his meadow there doth contain twenty acres, it seems this is a good grant for the whole twenty acres. So if one grant thus [all those forty-seven acres of land by the sleight, whereof fifteen lie in *D.* twenty in *E.* and twenty-five in *F.*] and in truth all of them do lie in *F.* and none of them in *D.* or *E.* this is a good grant to carry the whole forty-seven acres.

Dier 80.

If one grant twenty load of wood, and say in his grant [of which twenty load of wood he had sixteen load by the grant of his father *I. S.*] and in truth *I. S.* did not grant any wood to him at all, or did not grant unto him sixteen load only: this is a good grant of the twenty load of wood, notwithstanding this false recital.

Bro. Grant, 69.

If one grant his manor of *D.* and doth not say in what town or towns it doth lie; this is a good grant. But it is best to say in what towns the manor doth lie; for if it lie in divers places (as it may) and any of the places into which it goeth be omitted, and the rest are set down; no part of the manor lying in the town that is not expressed will pass.

Bro. Grant, 53.
7 H. 4. 41.

If one grant a manor, and that which in truth is but one manor, by the name of the manor of *A.* and *B.* this is a good grant of the manor. And so also it is if it be two manors, as if a man be seised of the manors of *Ryton* and *Condor*, in the county of *Salop*, and he grant in this manner [*totum illud manerium de Ryton & Condor cum pertinent. in com. Salopie:*] this is a good grant of both the manors. Otherwise it is in case of the king.

Co. 1. 46.

Prerogative.

If one have a farm of land, meadow, &c. by lease called *Hodges*, lying within the parishes of *St. Stephen* and *St.*

Curia Co. B. Pass. 9 Jac.

(*k*) But where there is such certainty in the description of the parcels (independant of that part of the description which states them to be in the possession of such a one) that there can be no doubt as to their identity; in that case, an error in stating in whose occupation the parcels are, will not affect the operation of the grant. See *Swift v. Eyres*, Cro. Car. 546.

Inter Plat.
& Sleep. Bro.
Grant, 93.

Peter, in *St. Albans*; and he, reciting the said lease, grant to *C.* his term, and interest in the house, lands, &c. called *Hodges* in the parish of *St. Peter* * and *St. Albans*; this grant is good only for so much as doth lie in the parish of *St. Peter*, and not for that which doth lie in *St. Stephen's*. But if he grant the farm, and doth not say in what parish it doth lie; this is a good grant of the whole farm. As in the case before of a manor that doth lie in divers parishes. And if in the case here, the farm lie within the parish of *St. Peter* only; the grant is good for the whole farm. If one recite, that whereas he hath such lands by forfeiture, or whereas such a one hath an estate of his land, or whereas the grantee hath paid him ten pounds or done him such service, or the like, and these things are not true, and afterwards he doth grant the land by apt words; this mistake in these cases will not hurt the grant. But otherwise it is in case of the king, in some of these cases.

* P. 249.

Co. 11. 50.

If one have a manor in which he hath parks and fishponds, and he grant the manor for life, except the game and fish, and after grant the reversion of the manor; this is a good grant of the game and fish also.

Co. super Lit.
6.

If a grant be of [*Centum libratas terræ*, or 50 *libratas terræ* or of *Centum solidat' terræ*] it seems these are good grants, and that hereby doth pass land of that value, and so of more or less.

Co. super Lit.
4.

If a grant be of an acre of land covered with water, this is a good grant.

Dier 84.
34 E. 3.

If a grant be of a certain portion of land or tithes, or of the fourth part of land or tithes, and there be a sufficient certainty in the description of it, this grant is good. And therefore if the grant be of the fourth part of the tithes, and of the offerings of the church of *St. Peter*, this is a good grant.

Bro. Grant,
101. 121.

If one, seised of an advowson in fee, grant to *I. S.* that as oft as the church is void he shall name the clerk to the grantor, and he shall present him to the ordinary; this is a good grant of the advowson.

Dier 46. Plow.
in Hill and
Grange's case.

A reversion may be granted by the name of a remainder, or a remainder by the name of a reversion, and such a grant is good. As if one grant land to *I. S.* the reversion to *I. D.* this is a good grant of the remainder.

Fitz. Grant,
63.

If one make a lease of land to husband and wife for their lives, and after grant the reversion of this by the name of the reversion of the land which the wife doth hold for life; this grant is void. So if one grant to two for life, and after grant the reversion of one of them, this is void.

21 Ass. pl. 23.

A felling, or grist mill, may be granted by the name of a mill only.

27 H. 6. 2.
Plow. 164.
Bro. Lease, 55.

If one grant in this manner [all that his messuage, &c. And all the lands, meadows, and pastures, thereunto belonging; this is a good grant, and certain enough to pass all the lands, meadows, and pastures, usually occupied therewith.

Fitz. Grant,
68.
Perk. sect. 68.

If the lord grant his manor by the name of [his manor with the reversion of all his tenants;] or by the name of

P. 250.

A A 2

[the

Prerogative.

Incertainly.

[the reversion of all his tenants bond and free which hold for life or years;] and do not name them by their particular names; these grants are good in these cases and certain enough.

If one grant land, and say not in what parish or county or village it doth lie; yet if there be any other matter to describe it; it seems the grant is good enough, and it may be averred where it lieth. But if there be no circumstantial matter in the grant to denote and decypher out where it doth lie; it seems the grant is void for uncertainty (l). And therefore if one grant his manor of Dale; or his lands in the occupation of I. S. or his lands that descended to I. S. or his lands that did belong to the priory of S. or the like; these are good grants and certain enough. *Id certum est quod certum reddi potest.*

Bro. Grant,
53.
Co. 9. 47.

If there be tenant for life of three houses, and four acres of land, and he in reversion grant the reversion of two houses and of two acres of this land; this is a good grant and hath sufficient certainty in it.

Perk. sect. 75.

If a grant be uncertain altogether, and have not sufficient certainty in it, and cannot be made certain by some matter *ex post facto*, it is void. And therefore if there be lord and tenant of three acres of land by fealty and twelve pence rent, and the lord grant [the services of the third acre] to a stranger; this grant is merely void. So if husband and wife hold an acre of land jointly of I. S. for their lives, and I. S. grant the reversion of the acre of land which the husband alone doth hold for his life; this grant is void (m). So if there be lord and three joint-tenants, and the lord grant the services of one of them to a stranger; this grant is void. So if one have twenty tenants that do pay him twelve-pence a-piece rent, and he grant five shillings yearly out of these rents, and doth not say of which tenants, this grant is void for uncertainty (n). So if consanguinity of pleas be granted, and it is not said before whom; this is utterly void. So if one have two tenements, and doth grant the reversion of one of them, and doth not say which; this is void for uncertainty. So if one grant estovers to another, and say not what nor how; this is void. So if one grant me so many of his trees, or of his horses as may be reasonably spared; this grant is void (o). And yet if one grant me so many of his trees as I. S. shall think fit; it seems this grant is good. And if one grant me one hundred load of wood to be taken by the assignment of the grantor, or to be taken by the

Perk. sect. 67.

Perk. sect. 68.

9 H. 8. 12.

44 E. 3. 17.
Bro. Grant,
52.

Dier 91.

Co. 5. 24.

(l) So, where there is any uncertainty in the limitation of the estate,—as where A. possessed of lands for a term of two thousand years, grants to B. and his wife (*without mentioning any term*), to the use of C. for his life and to the heirs of his body; and in default of issue to B. for one thousand eight hundred years; the first limitation was held to be void for uncertainty, it mentioning to grant to B. and ux. but not saying for what estate or term.—See *Kersly v. Duck*, 2 Vern. 684.

(m) The lands are held for the lives of the husband and his wife, and not for the life of the husband alone, therefore the grant, not being of the real and proper reversion, is bad.

(n) Had he granted, or rather assigned, the rents of five distinct tenants, this would have been good.

(o) For there is no standard to reduce the grant to a certainty. Hob. 168. Moor. 880.

assignment of *I. S.* these are good grants. So if one grant me three acres of wood toward the north side of the wood; this is a good grant, and certain enough.

Bro. Done, 31.

If one grant to one of the children of *I. S.* and *I. S.* hath more * than one, and he doth not describe which he doth intend; this grant is void for uncertainty.

* P. 251.

9 E. 4. 36.

Perk. sect. 74.

If one grant to me a rent, or a robe; twenty shillings, or forty shillings; or common of pasture, or rent; in the disjunctive, which is at first very uncertain; yet this grant may become good, for if I make my election, or he pay the rent, or perform the grant in either part; the grant is now become good. So if one be seised of two acres of land, and he doth lease them for life, and grant the remainder of one of them, and doth not say of which, to *I. S.* in this case, if *I. S.* make his election which acre he will have, the grant of the remainder to him will be good. So it is when a man hath six horses in his stable, and he doth grant me one of his horses, but doth not say which of them; in this case, I may choose which I will have, and in these cases when I have made my election, and not before, the grant is good. And if in these cases, the grantee doth not make his election during his life, it seems the grant will never be good. If one be seised of land, and lease it for years rendering ten shillings rent, and after he doth grant a rent of ten shillings out of this land to a stranger; in this case, albeit there be some uncertainty in the grant, yet this is a good grant of a rent of ten shillings; but it shall be taken a grant of a new and not of the old rent, and therefore shall not take effect until the particular estate be ended (*p*).

Bro. Grant,
17.

See more to this point in *Deeds* and their *Exposition*, chap. 5. numb. 15. and *Fine*, chap. 2. numb. 7. (*q*).

In some cases, albeit there be in a grant a good grantor, and a good grantee, and a thing granted, and all these are duly and certainly described, yet the grant may be void for some fault in some other thing touching the grant: as,

5. In respect of matter in some other parts of the grant.

Bro. Grant,
154.
Co. 1. 155.
Plow. 350.

1. In the commencement of the estate. For if a man be possessed of a term of years, albeit it be one hundred years, or upwards, and grant to another all the residue of this term of years that shall be to come at the time of his death; this grant is void for uncertainty (*r*). And yet if a man possessed of such a term in land, grant the land to another, to have and to hold to him after the death of the

1. In the commencement of the estate.

(*p*) If the rent granted to the stranger was expressed to commence in *presenti*, in that case it could not be held that it was not to take effect till the end of the particular estate; and even if not expressed to commence in *presenti*, yet, if it was not expressly granted to commence in *futuro*, ought not to be considered as commencing in *presenti*, and might not the grantee require the lessee to pay his rent of ten shillings to him, (the grantee) in discharge of his (the grantee's) rent-charge of the same amount. See the case of *Moss v. Galtimore*, Dougl. 266. (and *Ex parte Wilson*, 2 Ves. 252.) the principle of which seems applicable in a case like the above.

(*q*) And further, as to mistakes and misrecitals in grants, in respect of names or things,—in *Bac. Abr. Grants (H)*.—*Vin. Abr. Grants (D)*.

(*r*) If an assignment of a term may be made to commence in *futuro*, (see *supra*, page 78, note (1).) in that case, it is conceived, the above grant would be good.

grantor

- grantor for fifty years, or for two hundred years; these are good grants; and in the first case, the grantee shall have fifty years, if there be so many to come of the term of one hundred years at the death of the grantor; and in the last case, the grantee shall have the land for the whole one hundred years, or so many of them as are to come at the death of the grantor. So if one grant any thing that doth lie in livery or in grant, and that is in *esse* at the time of the grant, in fee-simple, fee-tail, or for life, and the estate is to begin at a day to come; this for the most part is void: howbeit in some cases the livery of seisin will help it. But a lease for years to begin in *futuro* is good enough (s). And if a lease be made to one for years, or for years determinable upon lives, * and after a lease is made to another of the same thing, to have and to hold from the end of the former lease, this is a good lease, and the commencement certain enough. So if a lease be made of land to one for life, and after the reversion thereof is granted to another for life; *cum post mortem vel alio modo vacare contigerit*; this is good. So if a lease be made to one for twenty years if he live so long, and after a lease is made to another *habendum* after the end of the term granted to the lessee, for twenty years to be accounted from the date of the deed last made, this is a good grant for twenty years after the first lease ended, and the words [to be accounted, &c.] shall be rejected (t). And if one grant a rent to me, *habendum* from the time of my full age for my life, and I am of full age at the time of the grant, this grant is good for my life. If a woman sole have a lease for years and take a husband, and then he in reversion grant the land to another, *habendum* after the term granted to the husband, &c. where in truth it was never granted to the husband but by an act of law, viz. the marriage, yet this is a good lease. 2. In the limitation of the estate. For if a grant be to two & *heredibus*, without *visis*, this is void for uncertainty (u). And yet a grant to one & *heredibus*, is good. And if a man grant two acres, to have and to hold the one in fee-simple and the other in fee-tail; or the one in fee-simple and the other for life; and doth not set down which in fee-simple, &c. in certain; yet this grant is good, and the grantee hath the election. And yet if one grant two acres to two men, *habendum* the one to the one, and the other to the other, and say not which either of them shall have; this is void for uncertainty. And if one have a reversion of land after
- Uncertainty.**
- * P. 252.
2. In the limitation of the estate: or in the *habendum* of the grant.
- Uncertainty.**
- Dier 58. Co. 5. 1.
- Pasc. 7 Jac. Dennis's case.
- Craddock's case. Pasc. 7 Jac. Co. B.
- Co. 9.
- Plow. 197. Co. 6. 36.
- 22 H. 6. 15. Plow. 28.
- Perk. sect. 75. 77. Plow. 152.
- Co. 10. 107. Plow. 147.

(s) Though according to the strict rules of the common law, an estate of freehold cannot be made to commence in *futuro*, except by way of remainder expectant upon an estate of freehold, yet there is no objection to a term of years being made to commence in *futuro*. So under the Statute of Uses, estates even of freehold may be made to commence in *futuro*, without any specific particular estate to support them, and the same may be observed with respect to executory devises.

(t) It would seem, that the more proper construction would be, that the second lessee should hold for so much of the term of twenty years, computing from the date of the second lease, as was unexpired when the first lease determined.

(u) If there was a recital or some other thing to shew that the grant was intended to be to the heirs of both, in that case there is no doubt but the word *visis* would be supplied by construction. See *supra*, page 101, note (y).

a lease

a lease for years, and grant the land *habendum* the reversion, or grant the reversion *habendum* the land, this is good.

In some cases, a grant or gift may be void, at least to some persons and purposes when there are none of the defects aforesaid in it; as when it is made upon a corrupt contract, or to the end to defraud creditors of their debts, or purchasers of their lands bought, or the like; whereof see before in *Deed*, chap. 4. numb. 5.

6. In respect of the end or ground of the grant.

21 H. 7. 5.
Co. super Lit.

And in some cases, albeit there be no other fault in the grant, yet it may become void for want of some other matter that ought to be done, as inrolment, livery of seisin, attornment, &c. (w) for where these things are requisite, the grant is not good until they be had, neither for that thing which will not pass without that ceremony, nor yet for that which otherwise would pass by the deed. And therefore if a feoffment be made of a manor to which an advowson is appendant, and no livery is made, so that the manor doth not pass; the advowson will not pass neither (x). Where a grant may be void by the refusal or waiver of the grantee, see before in *Deed*, numb. 6. chap. 4.

7. In respect of the omission of some ceremony, &c.

7 H. 6. 43.
21 H. 7. 23.
Perk. sect. 69.
Bre. Grant,
175. Kelw.
88.

If one make a feoffment with warranty, and after the feoffee doth grant to the feoffor, that neither he nor his heirs shall vouch the warrantor or his heirs upon the warranty; this is a good discharge of the benefit of voucher, and doth bar the feoffee of it. And yet he may bring a *warrantia chartæ* still. So if one grant to me a rent-charge, and afterwards I grant to him that he shall not be sued for this rent; this is a good grant to bar me of bringing an annuity for the rent; and yet I may distrain for the rent still. And so *è converso*, if I grant to the grantor, that he shall not be distrained for the rent; by this I am barred of a distress, but not of bringing an annuity for the rent. So if the lord doth grant to his tenant, holding by knight's service, that his heirs shall not be in ward, &c. or a man doth grant to his debtor that he will not sue him for the debt at all, or until such a time; or one grant to his lessee for life or years that he shall not be impeached for waste; all these are good discharges, and may be pleaded by way of bar to avoid *circuity of action*.

P. 253.

5. What shall be said a good grant in the nature of a release or discharge: or not.

And now because attornment, as hath been shewed, is necessary in some cases to the perfection of some conveyances and grants of things that lie in grant and not in livery, we must therefore here, ere we can go further, as a necessary appendix to Grants, add the learning of Attornment, which followeth next in order (y).

(w) Attornment now rendered unnecessary by the act of the 4 Ann. c. 16. s. 9.

(x) Though this doctrine may be correct in the instance of an advowson appendant, where there was clearly no intention to sever it, yet it must not be inferred, that if a deed cannot take effect with respect to one part of the property comprised in it, it shall have no operation as to the rest; for if a feoffment is made of lands partly in the possession of the feoffor, and partly in the possession of his lessee for years, though the feoffment might be void as to the lands in the feoffor's own possession from the want of livery, yet it is conceived it would be good as to the lands in the possession of his lessee as a grant of the reversion. See *supra*, page 83, note (a), as to deeds operating in some other way than the one intended by the parties.

(y) This chapter on grants, does not particularly contain any rules for their construction; it refers in several parts to the chapter on the exposition of deeds: that chapter contains some general rules for

for the construction of all parts of all kinds of deeds: and in addition thereto, it may not be altogether unacceptable to the reader to have subjoined some cases, which serve to establish the rules of construction of grants in general.

Where there is sufficient matter to guide the intent of the party, in such manner that lay persons may understand it; or sufficient matter is contained in the deed to *shew the intent*; there the deed, and the words therein, shall be taken so as to make the deed good, rather than destroy it.—*Windham v. Windham*, And. 60.

"As far as it may stand with the rule of law, it is honourable for all judges to judge according to the intention of the parties, and so they ought to do." Co. Lit. 314. b.

Ld. Ch. J. *Willes*, in delivering the opinion of the judges in the case of *Smith v. Packhurst*, mentions these two maxims, "that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of deeds should take effect;" and "that such a construction should be made of the words in a deed as is most agreeable to the intent of the grantor," and expresses himself in these remarkable words:—"These maxims are founded upon the greatest authority, *Coke*, *Plowden*, and Lord Chief Justice *Hale*; and the law commends the *astutus* (the cunning) of judges, "in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent, may shew the ingenuity of counsel, but is very ill becoming a judge." 3 Atk. 136.

In expounding a grant according to the intent, it must be done according to the intent at the time of the grant; as, if I grant an annuity to *I. S.* until he be promoted to a competent benefice, and at the time of the grant he was but a mean person, and afterwards is made an Archdeacon, yet if I offer him a competent benefice according to his estate at the time of the grant, the annuity doth cease. Cro. Eliz. 35.

But in construing the deed according to the intent, the construction must be upon the whole deed, and not one part taken, and another left out.—*Baldwin v. Martin*, And. 225.

"A deed ought to be so expounded, that all parts of it may stand together; and it being a common assurance, the judges shall break the deed in pieces to fulfil the intents of the parties:" per *Archer*, J. Cart. 98. cites 9 Co. 47.

One clause may be explained by another. 7 Rep. 41. a. *Berisford's case*. But where there are two clauses in a deed, of which the latter is entirely contradictory to the former; there the former shall stand: per *Nicholas*, J. Hard. 94. though the law will, however, construe that part of a grant to precede, which ought to precede, in order to fulfil the intention. 10 Rep. 28. *Sutton's Hospital case*.

An insensible clause doth not make the residue of the deed vicious, which is sensible of itself. 1 Saund. 320. *Pordage v. Cole*.

"The law, in the true construction of grants, hath respect to the estate of the grantor,—to the ability of the grantee; to the consideration which leads the estate; and to the recompence and loss which is sustained"—per *Doderidge*, J.—in 3 Buls. 125, *Gough v. Howard*.

No construction shall be made contrary to the very express words of the grant. Winch. 47. *Bishop of Gloucester v. Wood*.

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fenda est. 2 Saund. 167. *Lanyon v. Carne*. Wing. Max. 24.

When the words are capable of different expositions, that shall be taken which supports the declaration or agreement, and not that which defeats it. 1 Salk. 324. *Wyatt v. Aland*.

Construction of words shall be taken according to the vulgar and usual sense and manner of speech in those places, where the words are spoken. 1 Buls. 175. *Hewitt v. Painter*.

Words in grants shall be construed according to a reasonable and easy sense, and not strained to things unlikely and unusual. Hob. 304. in case of *London v. The Collegiate Church of Southwark*.

Verba posteriora, propter certitudinem addita, ad priora, qua certitudine indigent sunt referenda. Wing. 167. See the instances there put to support this maxim.

General words do not imply any certainty, nor shall conclude any common person to say, that he has nothing there; and the difference between general grants and particular, appears in Pl. C. 191, *Wroteley's case*.

Words subsequent may qualify and abridge, but not destroy, the generality of the words precedent. 8 Rep. 154. b. in *Altham's case*.

"The rule, that the general words subsequent shall be restrained by the precedent particular words, is good and general; especially where the particular words comprehend and express a thing of an inferior nature to the general words subsequent; and that the general words are put without their dividing differences; for there indeed the generality of them shall be controlled by the bounds of the particular precedent words. But where the general words do put the proper difference of particulars, and besides take a higher species than the particulars mentioned before; as where the devise was of all his plate and jewels, and all other his estate real and personal, &c. there the general words shall over-reach the particulars before, as if in the *Archbishop of Canterbury's case*, (3 Rep.) the words had been, [and all the ecclesiastical persons of superior or inferior rank;] they would have taken in *Archbishops*, *Bishops*," &c. per *Holt*, Ch. J. 6 Mod. 107. *Countess of Bridgewater v. Duke of Bolton*.

When words contained in a deed go to several senses and purposes, the deed shall be taken according to the sense of the words, without taking or expounding any word to be vain or confounding the sense of it, as if in the deed be contained *dedi*, *remisi*, &c. this may be a deed of grant, feoffment, release, or confirmation, or all these as the case requires. 2 And. 20. *Earl of Pembroke v. Barkly*.

When words of *discrete* nature are inserted in a conveyance, the grantee has election to use which of them he will. *Smallman v. Powis*, 3 Brownl. 292.

Talis interpretatio semper fit, ut evitetur absurdum, et inconueniens, et ne iudicium sit illusorium.
1 Co. 52. a.—Wing. 21.

Where from the nature of a deed it is evident that the party should have a particular power or privilege, the Court will construe the deed so as to give him such power, even though it should contravene a rule of law—as if one should demise ground to be used as a nursery ground; a clear inference would arise that the lessee should have the power of removing the trees he planted. 3 East's T. R. 44.

For further information on the Exposition of Deeds, see the chapter on Deeds and Exposition of Deeds.

CHAP. XIII.

OF AN ATTORNMENT.

1. *Quid.*

AN attornment is the agreement of the tenant to the grant of the seignior, or of a rent; or the agreement of the donee in tail, or tenant for life or years, to a grant of a reversion or of a remainder made to another. As where the lord, or one that hath a rent out of land, doth grant over his seignior, or his rent to another; or one that hath a reversion or a remainder, after an estate for life or years, doth sell or give the same away to another; in these cases, the tenant of the land must have notice of this sale or gift, and of the alteration of the party to whom he must attend in his services; and he must give his consent to the same gift or grant, or else generally the same is not good. And this yielding of consent is called an attornment (*a*). And it is either actual, or verbal, or actual and verbal both.

Co. super Lit.
309. Terms of
the Law.
Plow. 25. Lit.
sect. 551.

2. *Quodplex.*

That which is actual, is either implied and in law, or expressed and in fact. Of all which there are divers examples hereafter following.

P. 254.

3. The effect of it.

The end, effect, or fruit of this agreement is to perfect a grant, and to make a good conveyance of an estate; for, where this is needful, no rent nor reversion will pass without it; neither can the grantee of the seignior, rent, or reversion, bring any action of waste for waste done in the land, nor distrain for any rent or service upon the land, before this is done. But this is only a bare assent, and therefore it shall not nor will enure, or work, to pass any interest, to make a bad grant good, to enfranchise a villain, nor to give a man a tenancy by disseisin, intrusion, or abatement, neither shall it work by way of estoppel. And therefore, if a man gain a rent issuing out of land by coercion of distress or otherwise, and the tenant of the land attorn to him; this will not amend his estate. But otherwise a grant and the attornment of the tenant do as

Lit. sect. 551.
Co. super Lit.
304. Lit. Bro.
sect. 267. 129.
379. 39 H. 6.
24. Co. super
Lit. 323. 313.
Lit. sect. 608.

(a) Attornment is now rendered unnecessary by the statute of 4 Ann. c. 16. s. 9. which enacts, That all grants or conveyances by fine or otherwise of any manors, or rents, or of reversions, or remainders, shall be effectual without the attornment of any of the tenants; but it is thereby provided, that no tenant shall be prejudiced by payment of rent to any grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusor or grantee.—And by statute 11 Geo. 2. c. 19. s. 11. reciting, that the possession of estates is rendered very precarious by the frequent and fraudulent practice of tenants, in attorning to strangers, who claim title to the estates of their respective landlords or lessors who are thereby put out of the possession of their respective estates, and put to the difficulty and expence of recovering the same by action at law: it is therefore enacted that all such attornments shall be void, and the possession not altered: but it is thereby provided that the said act shall not extend to affect any attornment made pursuant to any judgment at law, or decree or order of a Court of Equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagees, after the mortgage is become forfeited.

effectually

effectually pass the freehold and inheritance of the reversion of land, as a feoffment and livery of seisin of land do pass the possession of land.

Lit. sect. 579,
580, 581. Co.
6. 68. Co.
super Lit. 309.
314. 320.

In most cases, where the grantee hath means to compel the tenant to attorn, there the attornment of the tenant is at least to some purposes needful; for howsoever it be true, that if a seignior, rent, services, reversion, or remainder be granted by fine, in this case the rent, seignior, &c. doth pass; so as the grantee may enter for a forfeiture upon the alienation of the tenant being tenant for life, years, by statute, or elegit, or upon an escheat of the tenant; or may seise a ward, or heriot, if it happen before any attornment be made; and if the reversion of a lease for years be granted by fine, and the lessee be ousted and the lessor disseised, the conusee may have an assise; and therefore as to all these purposes the attornment of the tenant is not needful: yet the grantee, his heir, or assignee, cannot distrain the tenant for rent, or bring any action that doth lie in privity between him and the tenant, as waste upon a waste done by the tenant, writ of entry *ad communem legem*, or *in casu proviso*, or *in consimili casu*, upon the alienation of the tenant, escheat upon the dying of the tenant without heirs, or ward upon the death of the tenant his heir within age, or writ of customs and services, until he have the attornment of the tenant; and therefore, as to all these purposes, the attornment of the tenant is necessary. And hence it is that the conusee of a fine hath means appointed him by the law to compel the tenant to attorn: for in case where the lord doth grant his seignior to another, and the tenant will not attorn, the conusee before the fine be ingrossed may have a writ called a *Per quæ servitia*, and thereby compel him to attorn. And in case where a man doth grant a rent to another, and the tenant of the land out of which the rent doth issue will not attorn, the conusee of the rent may have a writ called a *Quem redditum reddit*, and thereby compel him to attorn. And in case where a man doth grant a reversion, or a remainder of his estate after tenant for life to another, and the tenant will not attorn, the conusee of the reversion or remainder may have a writ called a *Quid juris clamat*, and thereby compel the tenant for life to attorn. And if the conusee of the fine die, before he have the attornment of the tenant, his heir, albeit he come to the thing descended by act of law, yet shall be in no better case than his ancestor was. And if the conusee of a fine by which he hath a reversion granted to him, before he hath gotten the attornment of the tenant, bargain and sell the reversion by deed indented and inrolled; the bargainee shall be in no better case than the bargainor was. And if a reversion be granted by fine, and the conusee before attornment enter and make a feoffment, and the lessee re-enter; in this case, the feoffee cannot distrain for the rent. And yet if there be lord, mesne and tenant, and the mesne grant the services of his tenant by fine to another in fee, and after the grantee die without heir, and by this means the services of the mesne escheat; in this case,

4. Where and in what cases the attornment of the tenant is necessary; or not: and how: and to what intents.

Old N. B. 170.
Co. super Lit.
252.

Idem.

Idem.
Co. super Lit.
310.
Co. super Lit.
321.

Co. 6. 68. Lit.
sect. 584. 583.

Per quæ servitia.

Quem redditum reddit.

* P. 255.
Quid juris clamat.

case, the lord may distrain for them without any attornment of the tenant.

In these following cases, attornment in law, or in deed, is absolutely and to all intents necessary, viz. * Where one doth make a lease for life, or years, to one, and after doth grant the reversion or remainder after the same lease ended, to another by deed, in fee-simple, fee-tail, for life, or years; in this case the lessee for life, or years, must attorn. ^b So where the lord doth grant his seigniority or the services of his tenant by deed, in fee-simple, or otherwise in fee-tail, for life, or years to a stranger; in this case the tenant must attorn. ^c So where the lord of a manor doth make a feoffment of his manor; in this case the services of the tenants will not pass without their attornment. ^d So if another man have a rent service, rent charge, or rent seck, issuing out of my land, and he doth grant this rent to a stranger; in this case I must attorn to this grant to the stranger. And if in these cases the tenant doth not attorn, the grant of the reversion, &c. is merely void.

If a reversion be granted after an estate of a tenant by statute merchant, staple, or elegit, or after an estate that any one hath until debts be paid, or the like; in these cases, the tenants must attorn, or this grant will not be good.

If one make a lease for years of land rendering rent, and after he doth grant the reversion to another for years, to begin after the death of the grantor; in this case, it is needful that the lessee for years in possession do attorn to make this grant good. But if one make a lease of his land to one for ten years, and after make a lease of it to another, to have and to hold from the end of the said term of ten years for the term of twenty years, in this case, it seems it is not needful that the first lessee doth attorn, but the grant is good enough without it. If one make a lease to another ^e for twenty years, and he make a lease over to a third for ten years rendering a rent, and then doth grant the reversion to a stranger; in this case, it is needful that the lessee for ten years do attorn: but if the lease for ten years be made without any reservation of rent, *contra*. For it is a rule, that where there is no tenure, attendancy, remainder, rent, or service to be paid or done, there attornment is not necessary. And hence it is, that where one doth grant common of pasture appendant or appurtenant, or estovers out of land, there needs no attornment of the tenant to make this grant good. And if a rent or common be granted to one for life, and after the reversion of it be granted to another; that in this case there needs no attornment to make this second grant good. And if one make a lease to one for ten years, and then make a lease to another for twenty years; in this case the second lease is good for the ten years to come after the first ten years ended, without any attornment of the first lessee.

If a lord exchange the services of his tenant with another for land; in this case the attornment of the tenant, by

^a Co. 2. 66.
Lit. sect. 551.
567. 571. Co.
super Lit. 316.

^b Lit. sect. 551.
Co. super Lit.
315. Perk.
sect. 656.

^c Co. 6. 68.
Doct. & Stud.
35. Lit. sect.
553.

^d Co. super
Lit. 312.
Lit. sect. 572.

Co. super Lit.
315.

Co. 2. 35.
Lit. Bro. sect.
298. Dier,
307. Co. super
Lit. 312. Lit.
Bro. sect. 151.
379. Bro.
Attor. 59.
Dier, 26. Lit.
Bro. 349.

And so it was
agreed in M.
37 & 38 Elia.
B. R.

Perk. sect.
249, 259.

by whom the service is to be done, is necessary to perfect this exchange.

Lit. sect. 563.

If there be lord and tenant in fee-simple, and the tenant doth make a lease to another man of the tenancy for life, and the lord doth grant the seigniority to the tenant for life in fee; in this case the tenant in reversion must attorn to the tenant for life upon this grant of the reversion, or the grant is not good.

Hil. 8 Jac.

If I be seised of a reversion after an estate for years, and I grant it to the use of myself for life, and after to the use of another and his heirs in fee, and after I grant my reversion for life to another; in this case it is needful that the tenant for years attorn to this grant.

Dier, 118.

If a lease be made to *I. S.* for his life, and afterwards another lease is made of the same land to *I. D.* for his life; in this case, it seems that *I. S.* must attorn to this second grant, or that the grant will not be good.

Lit. sect. 587.

An estate of a seigniority cannot be gained by a disseisin, abatement, or intrusion, without an attornment. And therefore if one disseise another of a manor which is part in demesne, and part in services, the services are not gained until the tenants attorn.

Co. 6. 68. Lit.
sect. 583.
586. Co. super
Lit. 321. 314.

In all cases for the most part where there is no means provided by law to compel the tenant to attorn, there their attornment in law, or in deed, is not necessary, unless there be some special default in the grantee. *Quod remedio destituitur, ipsa re valet, si culpa absit.* And therefore an attornment is not necessary in these cases following, viz.

¶ F. N. B.
121. M.

Where one doth grant a rent, reversion, remainder, service, or seigniority to another by way of devise by a last will and testament, or by letters patents from the king, or where such things are granted by matter of record from a subject to the king. So when the thing granted doth pass by way of use, and doth vest by force of the statute of Uses: as if one that is seised of land in fee doth make a lease of it for life, or years, to *I. S.* and after levieth a fine; or doth covenant to stand seised of the reversion of this land (or of the land itself which is all one) to the use of another; or doth bargain and sell the reversion in fee, or for years; in these cases, the tenant need not to attorn: but if *A.* grant a reversion to *B.* to the use of *C.* and the deed is not inrolled, or the use arise not upon consideration of blood, &c. in this case, if the tenant doth not attorn the reversion will not pass.

¶ P. 257.

Co. 6. 68. super
Lit. 321.
2. 35.

If one by a common recovery suffered, grant a reversion to the use of himself, his wife, or children; in this case, there needs no attornment of the tenant by the statute of 7 H. 8. cap. 4. So where one doth come to any such thing by title or seigniority paramount, as by escheat, surrender, or forfeiture, or by descent; in all these cases, and the rest before, the attornment of the tenant is to no purpose, neither to pass the thing as to the estate, nor to make a privy to distrain or bring action of debt. And therefore if there be lord, mesne, and tenant, and the mesne grant the services of his tenant by fine to another in fee, and after the grantee dieth without heir; in this case the services

Agreed in the
court of Wards,
Hil. 18 Jac.

¶ Calvin's case,
Pasch. 7 Jac.
B. R.

Lit. sect. 583.
5 H. 7. 18. 19.
Co. super Lit.
321.

vices

vices of the mesnalty shall come to the lord paramount and he may distrain for them, or bring any action that lieth in privity for them without any attornment. So if lessee for life of a manor surrender his estate to the lessor; there needs no attornment of the tenants of the manor to make this estate to pass. So if the reversion of a tenant for life be granted to another in fee, and the grantee die without heir, so that the reversion doth escheat; in this case, the lord may distrain, or bring any action of waste, &c. without any attornment. So if a reversion descend to an heir from his ancestor; in this case, it will vest in the heir without attornment, and attornment in this case is not necessary. So if the conusee of a statute merchant extend a seignior, or rent, for debt; the seignior or rent shall be vested in him without any attornment of the tenant.

Co. super Lit.
321.

If a copyholder in fee make a lease for years, by licence of the lord, rendering rent, and after surrender the reversion to the use of *I. S.* in this case, it seems an attornment of the tenant is not needful, and *I. S.* shall have the rent without any attornment.

Per three Jus-
tices, Trin.
4 Jac. B. R.

If one grant the reversion of copyhold lands for life, or years; or grant the seignior of copyhold lands of inheritance; in these cases there needs no attornment of the tenants to make the grants good. And so also is the law for an estate at will by the common law.

Curia M. 37 &
38 Eliz. B. R.
Co. 2. 35. su-
per Lit. 311.

P. 258.

If a lease be made to one for life, the remainder to another in tail, the remainder over to the right heirs of the tenant for life, and the tenant for life doth grant his remainder in fee; in this case, there needs no attornment of the tenant in tail, but the remainder will pass by the deed presently without any attornment at all.

Lit. sect. 578.

If one lease for life, the remainder for life, and after the lessor release all his right in the land to him in remainder for life; in this case there needs no attornment of the lessee for life, to perfect this release.

Lit. sect. 575.

If two or more joint-tenants, make a lease for life, rendering rent, and one of them doth release the rent to the other; in this case, there needs no attornment to make the rent to pass.

Lit. sect. 574.

In all cases where the grant is in the personalty, there needs no attornment. And therefore in grants of annuities, which do charge the person of the grantor only, and not his land, there needs no attornment. And in all cases where there is an attornment in law, there needs no attornment in deed.

Agreed in
Curnock's
case,
M. 3 Jac.
Co. B.

5. By whom
an attornment
may and must
be made; or
not.

If there be lord, mesne, and tenant, and the lord grant the fee of the seignior; in this case, the mesne, and not the tenant, must attorn.

Lit. sect. 455.

If one make a lease for life, and then grant the reversion for life, and the lessee attorn, and after the lord grant the seignior; in this case it seems the grantee, and not the first lessee for life, must attorn.

Co. super Lit.
319.

If there be lord and tenant, and the tenant make a gift in tail, or lease for life, of the land, and after the lord grant the services to a stranger; in this case, the tenant

Lit. sect. 554.
556. Co. su-
per Lit. 311.

for

for himself, and not the tenant in tail, or for life, must attorn: for it is a maxim in law, that no man shall attorn to any grant of any seignior, rent, service, reversion, or remainder, but he that is immediately privy to the grantor. But to the grant of a rent-seck, or rent-charge, issuing out of such land as before, the under-tenant in tail, or for life, and not the immediate tenant himself, must attorn.

Lit. sect. 356. If there be tenant for life, the remainder in fee, and the lord grant the services to a stranger; in this case, the tenant for life, and not him in remainder, must attorn.

Idem. If there be tenant for life, the remainder in tail, and he in the reversion after their estates doth grant his reversion to a stranger; in this case, if either of them need to attorn, it must be the tenant for life.

Co. super Lit. 312. Lit. sect. 358. If a woman that hath a husband be to attorn, the husband may and must do it for her; and the attornment of the husband for the wife, whether it be expressed or implied, will bind the wife. **Husband and wife.**

Lit. sect. 371. Co. super Lit. 316, 317. Co. super Lit. 312. If one make a lease for years of land, the remainder for life, and after the lessor doth grant the reversion; in this case, the tenant for life or years either of them may attorn. **P. 259.**

If a rent-charge be issuing out of land, and the tenant be disseised of the land; in this case, the disseisor must attorn to a grantee of the land. But in case of the grant of a rent service, the disseisee may attorn if he will, for the privity is between the lord and the disseisee only.

Ibid. If a man make a lease for life to *I. S.* of land, and after grant a rent charge out of it to *I. D.* and after he grant over this rent to another; in this case, the lessor, and not *I. S.* must attorn.

Co. super Lit. 316. 8 E. 4. 10. The tenant in dower after she hath assigned over her estate, and not the assignee, must attorn to the grant of the reversion. And yet some hold that the assignee also may attorn. The same law is also of the tenant by the courtesy: but it is not so in other cases; for if the reversion of lessee for life be granted, and lessee for life assign over his estate, the assignee, and not the lessee, must attorn.

Co. super Lit. 315. If lessee for life assign over his estate upon condition, and then the reversion is granted; in this case, the assignee, and not the lessee for life, must attorn.

Co. super Lit. 315. Perk. sect. 231. If a tenant in fee-simple, that ought to attorn to a grant of a seignior or rent, die before he make an attornment, his heir must attorn, and an attornment made by him is good. So if he grant away his land before he make his attornment, his grantee may attorn, and an attornment made by him will be good enough.

Co. super Lit. 311. If a lord of a manor make a lease of his manor for life or years, and the freeholders and others do attorn to the lessee, and after he grant away the reversion of the manor to a stranger; in this case, the lessee for life, or years, must attorn, and this will bind all the freeholders.

Ibid. If there be lord and tenant by homage, fealty and rent, and the tenant is disseised, and then the lord granteth the rent to another; in this case, the disseisor, and not the disseisee,

disseisee, must attorn; but if he grant the whole seignior, the disseisee may attorn.

Infant.

A voluntary attornment, where it is needful, may be made by an infant, or one that is deaf and dumb (who may do it by signs). But one that is *non compos mentis* cannot make an attornment. Co. super Lit. 315.

Non compos mentis.

6. To whom an attornment may and must be made: or not.

The attornment must always be made to the grantee of the reversion, rent, &c. according to the grant; whether the attornment be express or implied. But if divers do take by the grant, the attornment may be made to one of them, and this shall avail the rest; as if a reversion or a rent be granted to two or more, and the tenant attorn to one of them, this is good to vest and settle the thing * granted in them all according to the grant. And if a lease be made by deed of a reversion to *A.* for life, the remainder in fee to *B.* and the tenant attorn to *A.* this is a good attornment to settle the remainder in *B.* But if the tenant attorn to *B.* during the life of *A.* this is not good for *A.* howbeit, if the tenant for life die before the attornment be made; in this case, the attornment may be made, and this shall be sufficient to perfect the grant of the remainder to *B.* Co. super Lit. 310. 315.

* P. 260.

If I grant a reversion to one man, and before the attornment of the tenant had to perfect the grant, he doth sell this reversion to a third man; in this case, the tenant may attorn to the second grantee, and this will make the grant good to him. But if the attornment be made to both the grantees, it is void for incertainty.

An attornment may as well be made to *cestui que use* of a reversion, as to the grantee of the reversion himself. And it seems it must be made to him, and not to the grantee of the reversion. For it was agreed in the court of wards, *Hil. 18 Jac.* That if a reversion be granted to *B.* to the use of *C.* that the attornment must be made to *C.* and not to *B.* who is but an instrument. Co. 6. 68. 11 H. 7. 12.

In all cases regularly where attornment is necessary, it must be made in the life-time of the parties grantor and grantee, or exchangor or exchangee; for if either of them die before the attornment be made, the grant or exchange is void. And therefore if a manor be granted, and livery of seisin be given upon the demesnes thereof, and one of the tenants die before attornment be made by him, his tene-ment will not pass, and the grant as to that part will be void; for in this case all the tenants, but tenant at will, must attorn. And albeit the grant of the reversion be to begin at a day to come, and after the death of either of the parties, yet must the attornment be made in the life-time of the parties, or otherwise the grant will not be good. And yet an attornment may be made after the death of the tenant, by his heir; and after the conveyance of the tenant, by his assignee. Co. super Lit. 310. Harding's case.

7. When and at what time the attornment must be made.

In all cases regularly where attornment is necessary, it must be made in the life-time of the parties grantor and grantee, or exchangor or exchangee; for if either of them die before the attornment be made, the grant or exchange is void. And therefore if a manor be granted, and livery of seisin be given upon the demesnes thereof, and one of the tenants die before attornment be made by him, his tene-ment will not pass, and the grant as to that part will be void; for in this case all the tenants, but tenant at will, must attorn. And albeit the grant of the reversion be to begin at a day to come, and after the death of either of the parties, yet must the attornment be made in the life-time of the parties, or otherwise the grant will not be good. And yet an attornment may be made after the death of the tenant, by his heir; and after the conveyance of the tenant, by his assignee. Co. 1. 151. super Lit. 310. Lit. sect. 551. Perk. sect. 363, 331. Co. super Lit. 313. 2. 35.

If a lease be made of a reversion to begin at a day to come; in this case the attornment may be made before or after the day, so it be made in the life-time of the parties. Co. 2. 35.

Co. super Lit.
310.

If one grant his reversion of White Acre or Black Acre, and the tenant attorn to the grant, before the grantee have made his election which acre he will have, this is a good attornment.

Co. super Lit.
309. 310. 8. 82.
4. 61. Kelw.
163.

If a man grant his reversion by deed to one, and after, and before the tenant do attorn, he levy a fine or make a feoffment of the land to another; in this case it seems the attornment after comes too late; but if the fine or feoffment be * but of part of the land granted before in reversion; in this case the first grant after attornment shall be good for the residue. And if a woman sole grant a reversion, and after, and before attornment, she marry with a stranger, and after the tenant attorn; in this case the attornment comes too late, for the marriage is a countermand of it. And if a reversion of an estate for life or years be granted, and the grantor before attornment doth confirm the estate of the tenant for life or years, and so change the estate, and after the tenant attorn, in this case the attornment comes too late.

* P. 261.

Co. super Lit.
309. 310. 315.
Lit. sect. 351.
Plow. 344.

To the making of a good attornment where it is needful, divers things are required. 1. It must be made by the person that ought to make it. 2. It must be made to the person that ought to take it. 3. It must be made in time convenient. 4. If it be an express attornment, the tenant must first have notice of the grant of the reversion, rent, &c. to which he must attorn; but otherwise it is of an attornment in law, for there notice in all cases is not necessary. 5. And it must be done in that manner the law doth prescribe. And for this, it is to be known that it may be made by words, or by deeds, and without any writing, or by deed or writing (and this is the safest way to do it.) And any words, written or spoken by the tenant, that do import an assent and agreement to the grant of the reversion, rent, &c. in such manner as the same is made after notice given to him of the grant, whether it be in the presence or in the absence of the grantee of the reversion, rent, &c. will make a good attornment in deed. And therefore, if the tenant after knowledge of the grant, use these words following, or any others to the like effect, to the grantee, *viz.* I do attorn, or turn tenant, to you according to the grant; or, I become your tenant; or, I agree to the grant; or, I am well content with the grant; or, God send you joy of it; these are good express attornments. And if the tenant, after knowledge of the grant, pay, do, or deliver, all, or any part of the rent, or service, before, or at the same time when the same is due, to the grantee, or give a penny, or farthing, an ox, or a knife, or any such like thing, or any other valuable thing, in the name of attornment, or in the name of seisin of the rent; this is a good express attornment; and that attornment, which is made by words, and deed or sign both, is the best; for that doth leave a more deep impression in the mind of the witnesses. But if one have a rent-charge issuing out of my land, and he grant it to a stranger; and I give him an ox to put him in possession of the rent; it seems this is no good attornment.

8. The manner of making an attornment: and what shall be said a good attornment: or not, Notice.

Lit. sect. 363.
351. 513. Co.
super Lit. 315.
49 E. 3. 13.

* P. 262.

If a man grant his reversion of my living to *I. S.* and his bailiff, that doth use to gather his rents, saith to me, that *I. S.* hath bought it, and I must hereafter pay my rent to him, and I tell him I am glad of it; this is a good attornment. And that, albeit it be in the * absence of *I. S.* And it is not material whether the stranger know of the grant, or not, so the tenant know of it. And an attornment made to the lord's steward in the court, in the absence of the lord, is a good attornment. For it is sufficient, if the tenant have notice, that he attorn to the grant in the presence of any whomsoever. Tenant for life was, the remainder in tail, he in the remainder granted his remainder, the tenant for life, having notice of the grant, saith to a stranger in his absence, that is the party, I am well pleased that the grant is made to him; it was adjudged to be good.

M. 2 Car. in the court of Wards. *Co. super Lit.* 510. *Curia B. R.* Hil. 11 *Car.* *B. R.* *Hilton's case.*

If a reversion be granted to one for life, and after the same reversion be granted to him for years, and the tenant attorn to both the grants at once; this attornment is void for incertainty. So if one grant his seigniorie to *I. S.* Bishop of *London* and his heirs, by one deed, and grant the same to *I. S.* Bishop of *London* and his successors, by another deed, and the tenant attorn to both grants at once; this attornment is void for incertainty. So if a reversion be granted to two several persons by several deeds, and the tenant attorn to both the grants at one time; this attornment is void for incertainty; and neither of the grants are perfected by the attornment in these cases. The implied attornment, which also doth amount to an express attornment, is made divers manner of ways. For if the tenant, after notice of the grant of the reversion, pay his rent to the grantee, or surrender his estate to the grantee, or pray in aid of the grantee, or accept a grant of the reversion or remainder from him that hath it, this is a good attornment in law. But if the tenant, after the grant of the reversion, not having notice of the grant, pay his rent to the grantee as a receiver, bailiff, &c. this is no good attornment. And therefore if the bailiff of a manor shall purchase the manor, or the reversion of one of the tenements, and the tenant, not knowing of the purchase, pay his rent to him, as he was wont to do; this is no good attornment in law. So if a man seized of a seigniorie levy a fine of it, and then taketh back an estate in fee, and the tenant, having no notice of all this, doth pay his rent to the consor, as he was wont to do; this is no good attornment in law, to perfect either of these grants.

Co. super Lit. 510. 11 *H. 7.* 12.

14 *H. 8.* 15.
34 *H. 6.* 41.

Co. super Lit. 512. *Calvin's case.*
Adjudged *Pasc.* 7 *Jac.* *B. R.*
Co. super Lit. 509. *Co. 2.* 67. *Dier* 302.

If there be lord and tenant, and the tenant let the land to a woman for life, the remainder in fee, and the woman doth take a husband, and after the lord doth grant the services to the husband in fee; in this case, this acceptance of the deed, by him that ought to attorn, is a good attornment in law. So if in this case the tenant lease to a man for life, the remainder over, and the lord grant the services to the tenant for life, and he accept thereof; this is a good attornment in law.

Lit. sect. 558. 566; &c.

If

Co. super Lit.
313.

If the lord by deed grant his seigniori to the tenant of the land and to a stranger, and the tenant doth accept of this deed; this is * a good attornment in law, to extinguish a moiety, and to vest the other moiety in the other grantee. So if one make a lease to *I. S.* for life, and after confirm his estate, the remainder over to *I. D.* and the lessee for life doth accept of the deed of this confirmation and grant; this is a good attornment in law, and doth vest the remainder in *I. D.*

* P. 263.

Lit. sect. 559.

If there be lord and tenant, and the tenant take a wife, and after the lord doth grant the services to the wife and her heirs, and the husband doth accept of the deed of this grant; this is a good attornment in law.

Lit. sect. 564.

If the conusee of a fine of services, sue a *scire facias* to have execution of the services, and hath judgment to recover; this is a good attornment in law.

Co. super Lit.
310.

If a woman grant a reversion to a man in fee, and after marry with the grantee; this is a good attornment in law, to perfect this grant made to the husband.

Lit. sect. 563.

If a lord grant his seigniori, and there be twenty manner of services, and the tenant, with what intent soever it be, pay or perform in deed any parcel of the services to the grantee; this a good attornment in law for all the services.

Lit. sect. 576,
577. Co. super
Lit. 319. Dier
212. Co. 6. 68.
5. 113.

If I be seised of land in fee, and make a lease for life or years of it, or it be extended by a statute or *elegit*, and then I make a feoffment of this land, and give livery of seisin upon it, and so put out the tenant, and after the tenant (or one of the tenants, if there be many) re-enter; this is a good attornment in law. And so also it seems is the law, if the lessee for life recover in an assise. But if a man make a lease for life, and then the lessor grant the reversion for life, and the lessee attorn, and after the lessor enter and make a feoffment in fee, and so disseise the lessee for life, and then the lessee re-enter; this is no good attornment in law by the grantee for life. And if the conusee of a reversion by fine disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter; this is no good attornment in law to the feoffee, to enable him to distrain, &c.

Hil. & Jac.

If one grant the reversion of a lease of a term of years, and before any attornment made, the lessee for years doth grant his term to the grantee of the reversion; in this case, this is no good attornment in law, to make the reversion pass.

Perk. sect.
231.

If one have land, and a rent issuing out of other land, both in one county, and he grant both by deed, and give livery of seisin of the land in the name both of the land and of the rent; this is no good attornment in law, to make the grant of the rent good.

So was it held
in Brokenbury
and Martial's
case, 5 Eliz.

If lessee for life, or years, subscribe his name as a witness to the sealing and delivery of the grant of the reversion, made by the lessor to a stranger; this is no good attornment in law, for he may do this and not have notice: but if he have notice of the grant, and * then put his hand to it; this is an attornment, *curia B. R. H.* 11 Car.

* P. 264.

Attornment to part of the grant good for the whole.

If a reversion be granted of two acres, or for forty years, or if services be granted, and the tenant doth attorn for one acre, or for part of the forty years, or for part of the services; this shall extend to all, and is a good attornment for both the acres, all the forty years, and all the services. And that, albeit the tenant say expressly it shall be good but for a part, and not for the whole. And so also it is of an attornment in law. And therefore if the grantee by fine of services, sue a *scire facias* to have execution of any part of the services, and have judgment to recover any part; or a lessee of three acres surrender one of them to the grantee of the reversion of all the three acres; this is a good attornment for the whole. But if one attorn for part of the land, or for part of the services, in case of the grant of a reversion of land, or the grant of services, and have no notice of the grant of any more; this attornment is not good for any part, but void for all.

Co. 2. 68. super Lit. 297. 314. 309. Lit. sect. 564.

Attornment to one good to others.

If a seigniori, reversion, or the like, be granted to two or more, and the tenant after notice thereof doth attorn to one of them, this is a good attornment, to perfect the grant to both or all of them. But if one die before attornment, and the tenant attorn to the survivor or survivors; this shall not avail the heir of him that is dead; but it is good to perfect the grant to the survivor or survivors, to whom it is made.

Co. super Lit. 297. 2. 68. 67.

If a reversion be granted to husband and wife, and the tenant attorn to the wife in the absence of the husband; this is a good attornment, to perfect the grant to them both. But if a reversion be granted to two men, and the tenant have notice only of a grant made to one of them, and he attorn to him only; this attornment is void, and not good to perfect the grant to either of them.

Calvin's case, Pasc. 7 Jac. B. R. Co. 2. 68.

Attornment by one good for others.

If two joint-tenants be for life, or years, and the reversion of their estate is granted to a stranger, and one of them attorn to the grant of the reversion; this is a good attornment for both of them. The like law is for tenants in common. But if *A.*, *B.*, *C.*, and *D.*, be lessees for years, and *C.* and *D.* be outlawed, so as they forfeit their parts to the king, and the king become tenant in common with *A.* and *B.* and after the reversion is granted to a stranger, and *A.*, *B.*, *C.*, and *D.* attorn; this is no good attornment to perfect the grant of the reversion; for *C.* and *D.* cannot attorn, and the attornment of *A.* and *B.* for the king and themselves is not good.

Co. 2. 66, 67. Lit. sect. 566. 6 Car. in the Lord Brook's case, in the Court of Wards.

Attornment made by the husband is good for the wife: whereof see before at *Numb.* 5.

9. Who shall be compelled to attorn: or not: and where.

• P. 265.

In all cases for the most part where attornment is needful, the tenant, whether he be tenant in fee-simple, for life, years, by * statute, elegit, or as executor until debts be paid, shall be compelled to attorn. And albeit the tenant be an infant, and come to the land by purchase or descent, yet he may be compelled to attorn; but then in this case his attornment shall not prejudice him; for when he is of full age, he may disclaim, or say he doth hold by less services.

Co. 6. 68. 9. 84. super Lit. 315.

Co. super Lit.
316. 318.

If there be tenant in tail of a reversion, and he grant this over to a stranger; in this case the tenant in possession may be compelled to attorn. But if the reversion, upon the estate of the tenant in tail, or upon the estate of the tenant in tail after possibility of issue extinct, be granted, such a tenant may not be compelled to attorn; and yet such a tenant may attorn *gratis* if he will. And the assignee of the estate of such a tenant in tail after possibility, &c. is compellable to attorn. And if one make a gift in tail, the remainder in fee, and the seignior, or a rent-charge issuing out of the land, is granted in fee by fine; in this case, the tenant in tail may be compelled to attorn.

Co. 6. 68. super Lit. 318.

In all cases for the most part where attornment is not needful, there is no means to compel the tenant to attorn. And therefore the tenant cannot be compelled to attorn to him that comes to a reversion or remainder by escheat, forfeiture, &c.

Co. super Lit.
318. 3. 86.

If one grant his reversion of land in mortmain without a licence, the tenant may not be compelled to attorn, until there be a licence had from the king.

Co. super Lit.
318. 3. 86.

Also it is a general rule, that when the grant by fine is defeasible, there the tenant shall not be compelled to attorn. As if an infant levy a fine, this is defeasible by writ of error during his minority, and therefore the tenant shall not be compelled to attorn. So if the land be holden in ancient demesne, and he in the reversion levieth a fine of the reversion at the common law; the tenant shall not be compelled to attorn, because the estate that passeth is reversible by a writ of deceit.

Co. super Lit.
309. 310. 297.
See before.

If the grant be absolute, and the attornment be on condition; yet this shall enure according to the grant. So if the attornment be put to part of the things or part of the time granted; this shall enure to perfect the grant for all. So if the attornment be made but to one of the grantees, it shall enure to the rest. So if the attornment be made to the particular tenant, it shall enure to him in the remainder, to perfect his estate also.

10. How an attornment shall enure and be taken.

Co. super Lit.
320.

If the estate of the tenant be with a privilege annexed, as without impeachment of waste, or the like, and the tenant attorn generally without any saving of his privilege; if the attornment be *gratis* and voluntary, whether it be an attornment in law or in deed, this shall not enure to extinguish his privilege: but if the attornment be made by the compulsion of a writ in this * manner, and without this saving, he hath lost his privilege for ever.

* P. 266.

Co. super. Lit.
310.

If a reversion, &c. be granted to two several men one after another, and he that hath the latter grant get the attornment of the tenant to his grant before the other; in this case, this shall enure to perfect the latter, and the first grant now cannot be made good.

Co. super Lit.
310.

If a reversion be granted to a man and woman unmarried, and before attornment made they intermarry, and then the tenant attorn; in this case they shall have the estate by moieties.

11. How an
attornment
shall relate.

An attornment as to the party grantor shall have relation to the time of the grant, to make the thing to pass out of the grantor *ab initio*, albeit it be made many years after the grant; therefore all acts done by him after the time of the grant, and before the attornment, to the prejudice of his own grant, as granting of rents, entering into statutes, or the like, are void as to the land, to charge it: and hence it is, that if a reversion be granted to an alien, and before the attornment of the tenant he is made denizen; in this case, the king upon office found shall have the land; and yet it shall not so relate, as to make the tenant chargeable to the grantee for any mesne arrearages, or for any waste in the lands from the time of the grant to the time of the attornment. But in respect of a stranger it shall not relate at all. And therefore if two deeds be of a reversion at several times, and he whose deed was made last gets attornment first, the reversion doth pass to him; and though the other get attornment afterwards, yet this will not help him by relation; and albeit the former grant of the reversion be in fee, and the latter for life only, yet the law will be all one in both cases.

Co. super Lit.
310.

And now having done with this, we come to a *Lease*.

CHAP. XIV.

OF A LEASE.

Terms of the
Law.Co. super
Lit. 42. 45.
Justice Dod-
dridge's Trea-
tise, called the
Use of the
Law. Bro.
Leases, 60.
457. Plow.
421. 432.
Djer, 125.

A LEASE doth properly signify a demise or letting of 1. *Quid*.
lands, rent, common, or any hereditament, unto an-
other for a lesser time than he that doth let it hath in it.
(For when a lessee for life or years doth grant over all his
estate or time unto another, this is more properly called
an assignment than a lease). (a). And this, albeit it may Assignment.
be made and done by other words, yet it is most com-
monly and aptly made by the words "demise, grant, and
let (b)." And in this case he that letteth is called the lessor, Lessor.
and he to whom it is let the lessee. This word also is Lessee.
sometimes, although improperly, applied to the estate, i. e.
the title, time, or interest the lessee hath to the * thing * P. 267.
demised, and then it is rather referred to the thing taken
or had, and the interest of the taker therein; but in this
place, it is applied rather to the manner or means of at-

(a) If a lessee should intend to make an underlease, but should demise the premises for as long or a longer term than he had in them, the instrument, though on the face of it purporting to be a demise would in reality be an assignment; and the lessor (assignor) would be without the remedy of distress for his rent; care therefore should be taken, in granting under-leases, that part (a day will do) of the term granted by the original lease remains in the lessor.

(b) Any words which shew that the parties intended that the lessee should occupy the lands as tenant, and that without any further deed or instrument being made, will be sufficient to constitute an actual present demise for years. Thus, the words *covenant, grant, and agree*, that A. shall occupy the lands for so many years; or even the word "*covenant*" alone will amount to an actual demise, where it is clear that the parties intended the instrument to operate as an actual lease. *Whitlock v. Horton*, Cro. Jac. 91. *Richards v. Sely*, 2 Mod. 80. And an instrument in the form of a *licence, or consent, or agreement*, that the lessee may occupy, or inhabit, or enjoy certain lands, &c. for a certain period, will constitute an actual present demise, where it is clear that the parties intended it should do so. See *Sparke v. Sparke*, Moore, 666; and see *Owen*, 125. *Drake v. Mundy*, Cro. Car. 207. *Per Yates*, J. 4 Burr. 2210. *Challoner v. Davies*, 1 Ld. Raym. 404. *Anonymous*, 11 Mod. 42. Though see Cro. Jac. 172, contra, but not law. A covenant to stand seised, where there is the consideration of blood, has been held to be a lease. *Right*, ex dem. *Busset v. Thomas*, 3 Burr. 1446. And where one by his will recited, "I have made a lease to J. S. for the term of, &c." it was held, that the recital amounted to a lease; and that the word "*have*" should be understood in the present tense, [as if the testator had said, I "*do*" make a lease,] in order to give effect to the intention. See Bac. on Leases, 163. It may be proper to observe, that an instrument cannot operate as a demise of a present interest to a person who is not a party to the instrument. See *Littleton and Perner's case*, 1 Leon. 136. *Parker v. Grovenor*, Moore, 480. *Perry v. Allen*, Cro. Eliz. 173. *Corbett v. Stone*, Sir Thomas Raym. 140. Under the Statute of Uses, however, or by way of trust, there is no doubt but a person, not a party to the instrument, may take either a present or future interest as a lessee for years: and even by a deed operating at common law, a term of years, by way of remainder, may be limited to a person not a party to the deed, and who will be liable, if he takes possession, to all the obligations of a lessee. See *Wright v. Cartwright*, 1 Burr. 282. In a deed poll, every grantee may be considered as a party; and therefore a demise by deed poll can never be considered as had on the ground of the lessee not being a party. In the case of an indenture, the rule seems to be, that to constitute a person a party he must be formally named as one at the commencement of the deed. Although, as we have just seen, almost any form of words will be sufficient to constitute an actual present demise where the parties so intended; yet the question frequently arises, whether an instrument is to be considered as an actual lease or as a mere agreement for one; but this point will be considered in a subsequent part of the chapter.

2. *Quotuplex*.

taining or coming to the thing letten. And in this sense it is sometimes made and done by record, as fine, recovery, &c. and sometimes and most frequently by writing called a lease by indenture, albeit it may be made also by deed poll (c). And sometimes also it is (as it may be of land, or any such like thing grantable without deed for life or never so many years) by word of mouth without any writing, and then it is called a lease parol (d). And hence comes the division of a lease parol, and a lease in writing. And all these ways it may be made either for life, *i. e.* for the life of the lessee, or another, or both; or for years, *i. e.* for a certain number of years, as ten, an hundred, a thousand, or ten thousand years, months, weeks, or days, as the lessor and lessee do agree. And then the estate is properly called a term of years: for this word "term" doth not only signify the limits and limitation of time, but also the estate and interest that doth pass for that time: these leases also for years do some of them commence in *presenti*, and some in *futuro*, at a day to come: and the lease that is to begin in *futuro*, is called an *interesse termini*, or future interest (e). Or at will, *i. e.* when a lease is made of land to be held at the will and

Term of years.

Interesse termini, or future interest.

(c) Although in the case of leases by corporations aggregate, leases of incorporeal hereditaments not incident to and granted with corporeal ones, leases for lives, and leases under powers which require a deed, a deed is necessary to the validity of the lease; * yet in other cases a deed is not absolutely necessary. A writing however, as will be seen in the next note, is necessary in almost every case. Where a lease is made by deed, it is most commonly made by indenture, and not by deed poll. Where a lease is made under a power which requires it to be made by indenture, there an indenture is absolutely necessary. So where the lessee executes a counterpart of the lease, there too it should be by indenture. In short, it is always the safest and best way to have an indenture, especially as an indenture, as we shall see hereafter, will operate by estoppel; which a deed poll will not.

(d) But by stat. 29 Car. 2. c. 3. leases of lands must be in writing and signed by the parties themselves or their agents duly authorised, otherwise they will operate only as leases at will; except leases not exceeding three years from the making thereof, and where the rent reserved to the landlord during the term, amounts to two-third parts at least of the full improved value of the thing demised. Leases which do not come within the exception of the act must be made by writing; and they must be so, whether they are made to commence in *futuro* or in *presenti*. 12 Mod. 610. *Bayley v. Hicks*, 1 Str. 651. 1 Ld. Raym. 736. Where a parol lease is made for more than three years, such lease will be merely a lease at will. [Respecting leases at will, see next page, note (f)].

(e) An *interesse termini* is that interest which the lessee has in the term, whether commencing in *presenti* or in *futuro*, before he makes an actual entry into the lands. Where indeed the term is created under the Statute of Uses, there the statute transfers the possession to the use and no entry is necessary, consequently in such a case an *interesse termini* cannot, properly speaking, exist. This species of interest (an *interesse termini*) may be assigned, (Co. Litt. 46 b. Cro. Eliz. 15, and 275. 2 Brownl. 233, and 1 Keb. 154.) or released; (Co. Litt. 270 b.) but it is said it cannot be surrendered, though an instrument purporting to be a surrender, will operate and may be pleaded as a release. But where it is held that an *interesse termini* cannot be surrendered, it is to be understood of a surrender by deed; for there is no doubt but it will be surrendered in law by the acceptance of another grant or lease inconsistent with it. Where an *interesse termini* is in joint-tenants, it will vest solely in the survivor if there is no severance of the joint-tenancy; (Co. Litt. 51 b. 270 b. Cro. Eliz. 157.) and it continues a valid and subsisting interest notwithstanding either the lessor or lessee, or both, should die before entry. An *interesse termini*, unless the period has actually arrived at which the term is to take effect in possession, cannot be barred by fine and non-claim. See *supra*, page 22, note (a). It may be proper to notice, that a person with a mere *interesse termini* cannot maintain a possessory action, as trespass or ejectment. See 1 Sid. 223, and Comb. 209.

* It does not appear to be settled, whether a lease for years, made by a person with a remainder or reversion in corporeal hereditaments is good unless made by deed. See Bac. Abr. tit. *Lease*, (N.) The better opinion perhaps is, that it is good. The safest course however in such a case is to make the lease by deed.

pleasure of the lessor, or at the will and pleasure of the lessor and lessee together: and such a lease may be made by word of mouth as well as the former (f).

See Grant,
Numb. 4.
Co. 6. 36. 34.
35. 1. 154. 155.
Co. super Lit.
45. 46.
Plow. 273.
523.

Regularly these things must concur to the making of every good lease. 1. As in other grants, so in this, there must be a lessor, and he must be a person able, and not restrained to make that lease. 2. There must be a lessee, and he must be capable of the thing demised, and not disabled to receive it. 3. There must be a thing demised, and such a thing as is demiseable. 4. If the thing demised be not grantable without a deed, or the party demising not able to grant without deed, the lease must be made by deed. And if so, then there must be a sufficient description and setting forth of the person of the lessor, lessee, and the thing leased, and all necessary circumstances, as sealing, delivery, &c. required in other grants, must be observed. 5. If it be a lease for years, it must have a certain commencement, at least then when it comes to take effect in interest or possession, and a certain determination, either by an express enumeration of years, or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent precedent by matter *ex post facto*, and then the contingent must happen before the death of the lessor or lessee. 6. There must be all needful ceremonies, as livery of seisin, attornment (g), and the like, in cases where they are requisite. 7. There must be an acceptance of the thing demised, and of the estate, by the lessee. But whether any rent * be reserved upon a lease for life, years, or at will, or not, is not material, except only in the cases of leases made by tenant in tail, husband and wife, and ecclesiastical persons. Of which see *infra*.

3. Things necessarily required in every good lease.

* P. 268,

For the ability and capacity of the lessors and lessees; and what shall be said a good lease or not, in respect of the ability of the lessor, and the capacity of the lessee (h);

4. What shall be said a good and a sufficient lease for life or years: or not.

(f) Leases *at will* being discountenanced, the courts, generally speaking, consider demises, where no specific term is mentioned, or where the lease cannot be sustained under the Statute of Frauds, and where a rent is payable, as tenancies from year to year; and such a tenancy can only be determined at the anniversary of its commencement, upon giving six calendar months previous notice. *Right v. Darby*, 1 T. R. 159. By the custom indeed of particular places, or by special agreement between the parties, a longer or shorter notice may be given. *Tomlin v. Rawlinson*, 3 Burr. 1603. *Doe v. Snowden*, 2 Blackst. 1224. *Green v. Copous*, 4 T. R. 361. This kind of tenancy at will (or tenancy from year to year) does not determine by the tenant's death, but devolves upon his personal representatives. *Doe v. Porter*, 3 T. R. 13. And if the lessor dies or conveys away the reversion, the interest of the lessee is not thereby determined, but he will be entitled to notice to quit from the heir at law, devisee, or grantee, exactly the same as from the lessor himself. See *Birch v. Wright*, 1 T. R. 373. *Baker v. White*, 2 T. R. 159. If a lease is granted, which is void against a remainder-man or reversioner, and the remainder-man or reversioner, with notice of the lease being void as against himself, accepts rent from the lessee, the lessee will afterwards be considered as a tenant from year to year. *Doe v. Ward*, 1 H. Blackst. 97. *Doe v. Weller*, 7 T. R. 478. *Right v. Bawden*, 3 East. 260. *Denn*, dem. *Brune v. Rawlins*, 10 East. T. R. 261.

(g) Attornment, as we have seen in the last chapter, is now rendered unnecessary; and in leases livery of seisin is in no case necessary, except in the case of a lease for life or lives where made by feoffment.

(h) It may be proper to enquire somewhat more particularly into the ability of the lessor and the capacity of the lessee; or in other words, by whom and to whom leases may be made. It may be laid down generally, that all persons, being natural-born subjects, and being of full age and free from the disabilities of infancy, coverture, or insanity, may be lessors or lessees. And a lease by an infant is not absolutely void but only voidable; at least where such lease reserves a rent and has the semblance of a benefit

1. In respect and the description of their persons; the nature and of the persons description of the thing demised; and what mis-recital, or of the lessor, and the lessee, mis- the thing leased, and the estate, property, or possession of the lessor therein. •

a benefit to the infant*. It is said in 3 Burr. 1806, (and see Co. Litt. 308 a.) to have been long settled, that an infant may make a lease *without rent* to try his title; and if a lease is made by an infant without rent, though not for the purpose of trying his title, yet if it is made by deed or writing which takes effect by the delivery of his own hand, there, it is conceived, the lease is not absolutely void, but only voidable. See Perk. sect. 12. And see Burr. 1806. A lease by an infant, reserving rent, being only voidable, acceptance of rent after he comes of age will affirm such lease. It is conceived, however, that it must be rent which actually becomes due after he comes of age, and not mere arrears of what became due during his minority. Where an infant lessor, after he came of age, said to the lessor, "God give you joy of it," (meaning the farm) this was held by *Mead* to be an affirmation of the lease. See Bac. Abr. tit. Leases (B).

As infants themselves may grant leases, (though voidable) so a guardian in socage may make a lease of the infant's socage lands, which will be good till the infant comes of age; and if the lease is made for a term beyond the infant's minority, it is not absolutely void against the infant, but only voidable; consequently capable of confirmation by the infant,—as by acceptance of rent, &c. Bac. Abr. tit. Leases (I. 9.) 2 Rol. Abr. 41. But see *Roe v. Parry*, 2 Wils. 129 and 135.

It is conceived, that a lease of an infant's lands made by a testamentary guardian appointed pursuant to the act of the 12 Car. 2. c. 24, would be good during the infant's minority; and if extending beyond that period would be capable of confirmation by the infant.

A feme covert (except under a power) cannot make a valid lease of her lands. Leases, however, of her lands may be made by her and her husband pursuant to the act of the 32 Hen. 8. c. 28; but leases under this act will be more fully noticed below. It may hardly be necessary to observe, that a lease of a married woman's lands may be made by fine or recovery, in which her husband joins; and where a lease of her lands is intended to be made which the act of Hen. 8. will not authorise, there a fine or recovery (according to the circumstances of the case) will be necessary; unless it can be made under a power. It may be proper to observe, that if a feme covert should make a lease by fine, which she levies without her husband as a feme sole, there the lease will bind her, unless her husband avoids the fine in his life-time. See *supra*, page 7, note (w), on the subject of a fine by a married woman, levied as by feme sole. Where a lease by a married woman is not good, it will, generally speaking, be not merely voidable but absolutely void; and consequently incapable of confirmation either by acceptance of rent or otherwise.

Generally speaking, persons of unsound mind can do no binding act; but the statute of the 11 Geo. 3. c. 21, authorises lunatics, or their guardians, or committees, under the direction of the Court of Chancery, to accept surrenders of leases for lives or years which are held of the lunatic, and to grant new leases of the premises held by the surrendered lease; and the act of the 43 Geo. 3. c. 75, authorises the committees of the estates of persons of unsound mind, to grant building, repairing, or other leases, under the direction of the Court of Chancery, of the freehold, copyhold, and leasehold estates of the lunatic, for such term of years, at such rents, and under such covenants as the Court shall direct.

Aliens are prohibited by the policy of the law from acquiring real property, except that an alien friend may take a house for his own habitation, though if such alien friend is an artificer or handicraftsman, he cannot even do this, the act of the 32 Hen. 8. c. 16. s. 13. prohibiting it. An alien, however, by naturalization or by being made a denizen, acquires the capacity to purchase and hold lands; and naturalisation renders valid purchases previously made, where the alien has not been deprived of them by the crown; and letters of denization have the same effect where they contain a confirmation of former purchases. An alien may therefore, after naturalization or denization, make a valid lease of his lands. See *supra*, page 56, note (x), relative to aliens; and see also the acts of 11 & 12 W. 3. c. 16. and 25 Geo. 2. c. 39, which give certain persons all the privileges of natural-born subjects.

Executors and administrators, unless restrained from underletting (see *supra*, page 123, n. (q)), may grant under leases of leasehold property, which the testator or intestate was possessed of. See Bac. Abr. tit. Leases (I. 7.) But where administration is granted *durante minori etate*, a valid lease can only be granted during minority. See Bac. Abr. tit. Leases (I. 7.); and 6 Co. 676. And where a leasehold is specifically devised, an under lease by the executors would, it is conceived, be bad in equity against the devisee. All persons who have only partial interests in the thing leased, as tenants for life, by the curtesy, in dower, for years, by elegit, statute merchant or staple, though they may grant leases which will be good during the continuance of their respective interests, yet they cannot grant them for a longer period, unless by virtue of an express power for the purpose. Though neither a mortgagor or mortgagee alone can make a lease to bind the other, yet each of them may bind himself and his own interest. In order, however, to make a valid lease of lands in mortgage, both the mortgagor and mortgagee should join in making it: And where the mortgagee has the legal estate, as is generally the case, the rent ought to be reserved to him, and the covenants, on the part of the lessee, entered into with him; (see *Webb v. Russell*, 3 T. R. 393; and *Stokes v. Russell*, 1b. 678.) for if the rent is reserved to the mortgagor, and the covenants entered into with him, no distress can be made for the rent, (unless under an express power for the purpose,) and the

* By the custom of particular places, leases by infants of their socage land may be good. Co. Lit. 4 b. covenants

mis-nomer will hurt, or not; see *Grant*, numb. 4, and *infra*, numb. 5, 6, 7.

Leases

covenants can only be sued upon as covenants in gross. (See cases last cited.) It is therefore proper always to reserve the rent to the mortgagee and to make the covenants with him, where he has the legal estate.

If a copyholder makes a lease for more than a year, without the licence of the lord, it is a forfeiture of his copyhold, unless the special custom of the manor authorises the lease. And a lease by parol, (See *East v. Harding*, Moore, 393. Cro. Eliz. 498.) or to commence in *futuro*, (Bac. Abr. tit. Leases (O.)) will be a forfeiture. But though a copyholder may, by the general custom of manors, grant a lease for a single year *without* licence, yet a lease for one year, and so from year to year, with the interval of a day or some other short period, would not be good, but would work a forfeiture. See Cro. Car. 233. Cro. Jac. 301. But for a lease without licence to occasion a forfeiture, an *actual interest* for more than a year must pass—a mere agreement or covenant to grant a lease will not work a forfeiture. 3 T. R. 739. 3 Keb. 638. 1 Bulst. 190. A demise for one year, and so from year to year for thirteen years more, “*if the lord will give his licence, and so as there shall be no forfeiture*,” is only an actual demise for one year, with a conditional agreement for a further term, and is no forfeiture. See *Luffkin v. Nunn*, 11 Ves. 170. So, where a copyholder agreed to grant a lease for twenty-one years, provided the lord's licence could be obtained, and that in the mean time it should be lawful for the lessee to occupy the premises, it was held that this only amounted to a lease for a year, and was no forfeiture. *Doe v. Morris*, 2 Taunt. 54 and 52. And where a copyholder granted a lease of freehold lands for twenty-one years, and also a lease of copyholds for a term authorised by the custom, and covenanted to renew the lease of the copyholds from time to time during the continuance of the freehold lease, and that in the mean time, and until such renewed lease should be granted, the lessee should hold the copyholds;—this was held not to be an actual lease of the copyholds, but only an agreement for one. *Fenny v. Child*, 2 Mau. & Selw. 255. An agreement therefore for a lease of copyholds, though for a longer period than the custom warrants, occasions no forfeiture: and a covenant or agreement, that the lessee shall hold or occupy the lands, will not, where there is any stipulation about a future lease, or about obtaining the lord's licence, amount to an actual lease; and therefore will not occasion a forfeiture. See cases above cited, and *Doe v. Clure*, 2 T. R. 739. *Nunn v. Luffkin*, 11 Ves. 170.

It may be proper to observe, that where a copyholder grants a lease by virtue of a licence, he must strictly pursue his licence, otherwise the lease is bad. See Com. Dig. tit. Copyholds (K. 3.) And where the lease is not according to the licence, a forfeiture it is presumed would be incurred, though if the deviation from the licence appeared to be inadvertent and not intended as a fraud upon the lord, there can be little doubt but a court of equity would relieve against the forfeiture. Where the lord has notice of the forfeiture, and admits the copyholder, such admittance will be considered as a waiver of the forfeiture. Com. Dig. tit. Copyhold (C. 3.)

In stating by whom leases may be made, it will be proper to notice lay and spiritual corporations, the trustees of charity lands, tenants in tail, and husband and wife seized *jure uxoris*. Leases by spiritual corporations, by tenants in tail, and by husband and wife seized *jure uxoris*, will be afterwards noticed in the places where the subjects occur in the text; but leases by lay corporations, and trustees of charity lands, not being noticed in the text, this may be a proper place to consider them. All corporations have the power *at law* of alienating their possessions, except where restrained by statute. *Mayor of Colchester v. Lowten*, 1 Ves. & Bea. 246. And where they have such power at law, they have the like power in equity, except where they hold their possessions upon a trust or for a purpose incompatible with the power of alienation: It may therefore be laid down, that leases by mayor and commonalty, bailiff and burgesses, or other lay corporations, whether aggregate or sole, are, generally speaking, good, for whatever length of time, or upon whatever terms they may be granted. Leases, however, by corporations aggregate, as we have before seen, must be made by *deed*, and must be under their common seal.

It may be proper to observe, that the crown cannot grant leases (being restrained by the act of the 1 Ann. stat. 1. c. 7.) for more than three lives or thirty-one years, or for some term of years, determinable on one, two, or three lives, to commence from the making of the lease; or if any lease is made to commence in reversion or expectancy, then the same, together with any lease in possession, is not to exceed the term of thirty-one years, or three lives, *in the whole*. The act requires the reservation to the crown of the ancient rent or more, or the rent which has been reserved and paid for the greater part of the twenty years immediately preceding the granting of any such lease; and where there shall have been no such previous rent, then a reasonable rent to be reserved, not being less than one-third of the clear yearly value of the property demised.—No lease is to be made without impeachment of waste.

Estates which come to the crown by forfeiture, escheat, or outlawry, or taken in execution for debt owing to the crown, are excepted out of the operation of the above act; and buildings which require rebuilding or repairing may be leased for fifty years or three lives.

For rent reserved on a lease made by the crown, the crown has a remedy by distress on all other lands of the lessee, as well as on those comprised in the lease; and if the lease should be a lease of incorporeal hereditaments, the crown has the like right of distress for the rent as it has for rent reserved on a lease of corporeal hereditaments. See Co. Lit. 47 a. note (1); and see *Attorney-General v. Mayor of Coventry*, 1 P. Wms. 306.

Leases for life, or years, or at will, may be made of any Bro. Leases,
thing 23.

Leases by trustees of charity lands (such leases being common, and abuses in granting them too frequently committed,) form an important subject of consideration. Where the donor has prescribed the terms upon which leases may be granted, the terms prescribed must be strictly attended to, otherwise the lease cannot be supported. See *Attorney-General v. Griffith*, 13 Ves. 565, and *Lydiatt v. Fouch*, 2 Vern. 410. [This, of course, is to be understood of cases in which the lessee knew the lands to be charity lands, for if he was ignorant of the fact, and had obtained the legal estate from the trustees, it is conceived his lease could not be disturbed.] Where the trustees are only authorised to demise for a certain number of years, a covenant for renewal contained in a lease, is void. See the last cited case, and *Taylor v. Dulwich Hospital*, 1 P. Wms. 655, and *Attorney-General v. Hensworth Hospital*, 14 Ves. 324. If, however, the term actually demised, and the term to be comprised in the renewed lease, did not together exceed the term which the trustees were authorised to grant, *there*, it is conceived, the covenant for renewal would be good. In a case where trustees were expressly authorised to lease for any number of years at rack rent; a lease for the long term of 999 years was held to be good, a full and fair rent being reserved. *Attorney-General v. Moses*, 2 Mad. Ch. Ca. 294. But the most important point of enquiry under the present head is,—what leases are valid where the donor has given no power of leasing. The trustees having the legal estate, it must be clear that at law they may grant leases upon what terms they please; and where the lessee has no notice of the lands being mere trust property, *there*, it is conceived, the lease would be good in equity as well as at law. But where the lessee has notice of the lands being charity lands, or mere trust property, *there*, it would seem, that to the validity of his lease in equity, it should be such as the trustees might grant consistently with a regard to the interests of the charity; for if it is not such, then the lessee must know that the trustees are guilty of a breach of trust, and coming in with full notice of such breach, he is to be considered as *particeps criminis*, and therefore properly punishable with the loss of his lease. To the validity therefore, in equity, of a lease of charity lands, the lessee should either have no notice that they are charity lands, or if he has such notice, then the lease should be such as the trustees might grant consistently with a regard to the interests of the charity. But though this would seem to be the wound rule by which to decide the validity of charity leases, yet, it is apprehended, that some, at least, of the decisions on cases which have arisen on charity leases are not perfectly reconcilable with it;—as where leases, with notice, have been held to be good, though granted for very long terms; so long as to make it extremely probable, from the progressive increase in the value of lands, either from depreciation in the value of money, improvements in agriculture, or increase of population, or the united operation of these causes, that the rent (though it might be a fair one at the granting of the lease) would, before the expiration of the term, fall far short of what it ought to have been.—The granting of such leases certainly could not accord with a regard to the true interests of the charity. It may be questionable too, whether leases, where fines are taken*, (though there should be no objection to the length of the term) can be considered, *prima facie*, as leases made agreeable to the rule above laid down; for the lessee, by paying a fine, enables the trustees to anticipate, as it were, the receipts of the rents, and thereby puts it in their power, by embezzling the money, to do a serious injury to the objects of the charity. It would therefore seem, that a due regard to the interests of charities would require, that giving fines on charity leases should be discouraged, by holding such leases to be void; unless the lessees could shew the application of the fines to purposes beneficial to the general objects of the charity,—the application of them for the benefit of present, to the prejudice of future objects, should, it is conceived, be considered as *bad*: the giving of fines ought to be no reason in favor of very long leases, unless it could be shewn that the fine had been laid out in such a way as to be permanently advantageous to the objects of the charity; as by laying it out in building upon, or otherwise improving either the same or other parts of the property:—In short, it would seem, that the great object of enquiry in determining the validity of charity leases with notice, is, whether the lease is or is not prejudicial to the general interests of the charity. Of course, slight deviations, where there was no dishonest intention, should not be regarded. Perhaps some legislative measure, relative to leases of charity lands, would be desirable. With these preliminary observations, it may be proper to notice the doctrine on the subject of charity leases, as it appears to rest upon decided cases: and first, it may be proper to observe, that if the lease is granted at an evident under-value, it will be set aside. *Attorney-General v. Magwood*, 18 Ves. 315. *Attorney-General v. Wilson*, Ib. 519. *Attorney-General v. Green*, 6 Ves. 452. *Attorney-General v. Owen*, 10 Ves. 555. *Attorney-General v. Gower*, 9 Mod. 224. *The Poor of Geruel v. Sutton*, Duke's Ch. Uses, 43. *Eltham v. Warreyn*, Ib. 67. But it would appear, that the under-value must be considerable to induce the Court to set it aside; (*Attorney-General v. Cross*, 3 Meriv. 541, and *Ex parte Skinner*, 2 Meriv. 437.) unless there was positive fraud in the case, or circumstances from which to infer it—as that the lessee was a relation of any of the trustees. See case last cited. If, however, the rent (or rent and fine together, supposing there was a fine,) is clearly less than a prudent person, letting his own property, would have taken, there the mere circumstance of under-value would seem to carry with it a strong suspicion of fraud. It may be proper, however, to observe, that the period to which the enquiry must be directed, whether the consideration was a fair one or not, is the time of granting the lease; for the circumstance of its becoming an inadequate one before the end of the lease, either owing to lands having risen in value or otherwise, is no reason for avoiding a charity lease. See *Attorney-General v. Magwood*, 18 Ves. 315. Where indeed

* Where the trustees of charity lands are under no restriction as to leasing, they may grant leases on lives, or for years determinable on lives, and take fines, especially if such is agreeable to the usual mode of leasing in the country where the lands lie, See *Attorney-General v. Cross*, 3 Meriv. 524.

thing corporeal or incorporeal, that lieth in livery, or grant.

leases of charity lands are granted for very long terms, there such leases may, generally speaking, be considered as bad on the mere ground of the term being unreasonably long. Thus, in a late case, it was laid down, that a mere husbandry lease for 99 years, at a rent and upon terms adapted to a lease of twenty-one years; or a building lease for 999 years, upon an expenditure only equal to a ninety-nine years term, could not be supported. See *Attorney-General v. Backhouse*, 17 Ves. 283. And in the case of the *Attorney-General v. Cross*, 3 Meriv. 540, the Master of the Rolls expressed himself of opinion, that a charity lease for a long term absolute, at a stationary rent, was not good. There is, however, no positive rule that a lease for a long term of years, or for lives, is *ipso facto* bad. *Attorney-General v. Cross*, 3 Meriv. 539. Thus, if the lessee paid a large fine, or laid out considerable sums in improvements, if the fine or sums expended formed a reasonable consideration for the lease, this would form a sufficient ground for supporting it, even though it was for a long term. See *Attorney-General v. Cross*, 3 Meriv. 359. *Attorney-General v. Brooke*, 18 Ves. 326; and *Attorney-General v. Smith*, 2 Vern. 746. But in order to make the laying out of money in improvements a ground for supporting a charity lease, the charity, it is conceived, should have a reasonable benefit from the expenditure; for an expenditure for the lessee's own benefit could be no ground for supporting the lease. It may be proper to observe, that where leases are set aside, and the tenant has laid out money in improvements, he will be entitled to a just allowance in respect of what he had expended, and for which he had not received a reasonable return. *Attorney-General v. Green*, 6 Ves. 452; and see *Attorney-General v. Balliol College*, 9 Mod. 410. On the other hand, where a lease is set aside for inadequacy of value, the lessee will be made to pay the difference between the rent (or rent and fine) and the real value, for the time he occupied the property.

It may be proper to notice, that though an original lease may be such as will be set aside, yet the interest of an under-lessee will be supported, where such under-lessee has given a fair consideration and had no notice, except that the estate was a charity estate. See *Attorney-General v. Backhouse*, 17 Ves. 283. [Where the under-lessee has given no fine, and pays a fair rent, it may be perfectly right to support the under-lease, and to direct (as is done in such cases, see case last cited, and see *Attorney-General v. Griffith*, 13 Ves. 565,) that the under-lessee shall pay his rent to the charity. But beyond this, perhaps it would not be prudent to support under-leases of charity lands, with notice of their being such, as it might render frauds in granting original leases more difficult of redress.]

Having pretty fully noticed by whom leases may be made, it may be proper to enquire to whom they may be made. They may be made to all persons, being natural-born subjects, who are of full age and free from the disabilities of coverture or insanity. Leases to infants are not, generally speaking, absolutely void, especially where they have the semblance of a benefit to the infant, but only voidable; and the infant, to avoid such a lease, must waive it before the first rent day after he comes of age. See Bull. Ni. Pri. 177. *Kitsey's case*, Cro. Jac. 320; and see Maul. & Selw. 477. Continuance upon the farm after he came of age, with payment of the rent, would clearly amount to an acceptance and confirmation of the lease.

A lease to a *feme covert* (unless it is under a power given to her before marriage to take leases) she may avoid after her coverture has ceased, unless her husband should dispose of it; for it is apprehended he would have the same right to dispose of such a lease as he has to dispose of a lease made to his wife before marriage: or he might disagree to it and avoid it if he pleased.

With reference to leases to infants, *feme coverts*, and lunatics, it will be proper to notice the act of the 11th Geo. 3. c. 21, which authorises lunatics, or their guardians or committees, and also infants and their guardians, and *feme coverts* or any person on their behalf, to make surrenders, under the direction of the Court of Chancery or Exchequer, of leaseholds for lives or years, in order to obtain new leases of the premises comprised in the surrendered lease: so that under this act valid leases may be made to infants, *feme coverts*, and persons of unsound mind. It would appear, indeed, that any lease to a person of unsound mind could not be avoided by himself, on the ground that a person cannot, as it is termed, *stultify himself*. If, however, he did not recover a sane state of mind, or recovering it did not do any act agreeing to the lease, his personal representatives, it is presumed, might avoid it. See Co. Litt. 2 b. So, it is apprehended, may his committee (2 Vern. 412 and 678), as may also the King (as to leases to idiots) after they are duly found to be idiots. Co. Litt. 247 a.

It has before been incidentally observed, that an alien friend may take a house for his own habitation. So an alien merchant, whose country is at peace with our own, may take a lease of a house for the purpose of trade or commerce. *Pilkinton v. Peach*, 2 Show. 135. *Rex v. Eastbourne*, 4 East. T. R. 1013. But leases to aliens of lands or hereditaments for agricultural purposes, without the licence of the crown, cannot be sustained against the crown, which would be entitled to such leases upon office found. They would, however, be good against the lessor. In the case of aliens who are artificers or handicraftsmen, the act of the 32 Hen. 8. c. 16. s. 13. makes void leases to them of any dwelling-house or shop. It has been held, however, that if an alien artificer occupies a house under a mere agreement, and not under an actual lease, that an action for use and occupation will lie against him notwithstanding the act of Hen. 8. See 1 Saund. 8. note 1. Leases taken by aliens after naturalization, are clearly good; and naturalization makes good those previously taken which the crown had not possessed itself of. The same may be observed respecting leases granted to denizens after denization; and also respecting such as are granted before denization, where the letters of denization contain a confirmation of former purchases.

Though corporations, both spiritual and lay, have the power of acquiring real property, yet they cannot now do so without a licence in mortmain, [see the act 7 & 8 W. 3. c. 37, relative to licences in mortmain]; therefore, without such a licence, no spiritual or lay corporation can take a lease of real

grant(i). Also leases for years may be made of any goods or chattels(i^a). See for this, *Grant, numb. 4*.

A man seised of an estate in fee-simple in his own right of any lands or tenements, may by deed or writing in the country, or without writing by word of mouth(k), make a lease of it for what lives or years he will. And he that is seised of an estate in tail of any lands or tenements, may make any lease out of it for his own life, but not longer; unless it be by fine(l) or recovery, or it be such a lease as is warranted by the statute of 32 H. 8. (whereof see more *infra*). And he that is seised of lands or tenements of any estate for his own or another's life, may make what lease for years he will of it, and it will be good as long as the lease for life doth last. And he that is possessed of lands or tenements for years may make a lease of it for all(m) or part of the years, and these are good leases(n). The tenants for life or years may also assign over all their estates if they please(o). And if such tenants make leases for longer time, as if lessee for years make a lease for life; it seems by this the land will pass for life, if the term of years last so long. But if he give livery of seisin upon it (as he must to

Co. 7. 12. f. 44.
Plow. 524.

real property. By the act of the 21 Hen. 8. c. 13, spiritual persons were restrained from taking leases of lands; but by an act of the 57 Geo. 3. c. 99. this act, and also certain other acts, are repealed, and spiritual persons authorised to take leases for lives, years, or at will, of any lands, (*for occupation by themselves*) not exceeding eighty acres; but if they take a greater quantity (without the bishop's consent), they are liable to a penalty of forty shillings an acre, for every acre above eighty.

(i) Though incorporeal hereditaments, as tithes, commons, advowsons, fairs, markets, &c. are demisable, yet rent, technically speaking, cannot, in a lease by a subject*, be reserved out of incorporeal hereditaments, except on a lease of a remainder or reversion in a corporeal hereditament. See Gilbert on Rents, 24. An action of debt, however, for rent in arrear, may be maintained on a lease granted by lay persons of such hereditaments; (see Bac. Abr. tit. Leases(A), and Bro. tit. Leases, 110.) and the act of the 5 Geo. 3. c. 17, authorises ecclesiastical persons to grant leases for three lives or twenty-one years, of tithes and all other incorporeal hereditaments, and to maintain an action of debt for the rent, if in arrear.

(i^a) With respect to leases of personal chattels, as a stock of sheep on a farm, or fixtures in a house, &c.; as the lease is a lease of the specific sheep or fixtures in existence at the time of making it, and as the identical sheep are not even expected to be in existence at the end of the lease, and as the fixtures may possibly be lost or destroyed during the lease, the lessee ought always to covenant with the lessor to leave other sheep equal in number and quality at the end of the term, or to leave the same or other fixtures equally good, making allowance for reasonable use and wear in the mean time. It may be proper to observe too, that sheep, or other chattels, specifically demised, cannot be distrained by the lessor for rent. See *Reade v. Lance, Dyer, 212*. Bro. tit. Leases, 23. The offspring, however, of sheep, or other live stock, may clearly be distrained, such offspring being the absolute property of the lessee. If sheep, or other live stock, belonging to a farm, and demised with it, should all die, or any material part of them, the rent would be apportioned. See Bro. Apportionment, 7. 9. If, however, the loss was occasioned by negligence or want of skill in the lessee, there, it is conceived, the rent would not be apportioned.

There are certain offices (or public official situations) which may be leased; yet as such leases are of rare occurrence, the Editor, instead of lengthening the note by any particular notice of the subject, conceives it may be sufficient to refer, for further information upon it, to those works which treat more copiously of leases;—as Mr. *Woodfall's Law of Landlord and Tenant*, and Mr. *Chambers's* very useful Treatise on Leases.

(k) See *supra*, page 267, note (d).

(l) And if it is made by fine, the fine will not give it validity against the issue in tail unless it is levied with proclamations according to the statute; nor will the fine give validity to the lease as against remainder-men or the reversioner, even though it should be levied with proclamations, except where they suffer themselves to be barred by non-claim.

(m) A lease for the whole of the term would amount to an assignment. See *supra*, page 266, note (a).

(n) Supposing him not to be restrained from underletting.

(o) That is, if the parties are not restrained from assigning.

* But the king may reserve a rent on a lease of incorporeal hereditaments; the reason of which is, that he can distrain on all the lands of the lessee. See Co. Lit. 47 a. note (1); and see *Attorney-General v. Mayor of Coventry*, 1 P. Wms. 306.

9 H. 7. 24.
18 Ed. 4. 2.
Plow. 545.

Lit. cap. Ten-
nant in Com-
mon, F. N. B.
62. G.

Bro. Leases,
58.

Co. 10. 49.

Plow. 133.

Bro. Scire
Facias, 36.

make the lease for life good) this is a forfeiture of the estate for years.

If an infant be seised of land in fee-simple, and he make a lease for years of it rendering no rent; this lease is void (p). But if there be a rent reserved upon the lease, then the lease is but voidable, and may, by the acceptance of the rent by the infant after his full age, be made good.

Joint-tenants, tenants in common, and parceners, may make leases for life or years of their own parts and pur- parties at their pleasures, and these leases will bind their companions. And one coparcener, or tenant in common, may make a lease of his part to his companion if he will (q).

If a feoffment be made upon condition, and before the time of performance of the condition, the feoffor and feoffee do join to make a lease for life or years of the land; this is a good lease.

* A man that hath an estate in land to him and his wife, and his heirs, may make what lease he will of the land, and this will be good against all men but his wife only, and that for her time (r).

If there be lessor in fee, and lessee for ten years; in this case, they two may join together and make a lease for lives, or for any term of years; and this is good (s).

A disseisee cannot make a lease of that land whereof he is disseised, until he make his entry, or recover the possession of the land again. So neither can a woman that hath recovered the third part of her husband's land in a writ of dower, make any lease of it before she be in possession

Forfeiture.
Infant.

Acceptance.

Joint-tenants.

Tenants in
common.

* P. 269.

(p) See supra, page 268, note (h), on the subject of leases by infants.

(q) By binding their companions, is to be understood, it is conceived, that if the lessor, who was a joint-tenant, &c. should die, the lease would be good against the surviving joint-tenant, &c. If joint-tenants join in a lease, this shall be but one lease; for they have but one freehold;—but if tenants in common join in a lease, it shall be several leases of their several interests. 2 Roll. Abr. 64. Com. Dig. Estates, (G. 6.) See more amply in Bac. Abr. Leases, (I. 5.) A joint tenant may grant a lease of his own share, to commence even after his death. See Bac. Abr. tit. Lease, (I. 5.); and *Harbin v. Barton*, Moore, 395.

Though one joint-tenant, tenant in common, &c. cannot lease the share of his companion, so as to bind his companion; (*Whitlock v. Horton*, Cro. Jac. 91.) yet if one joint-tenant, &c. should make a lease of the whole estate, and before the end of the term his companion's share should come to him by survivorship or otherwise, if the lease was made by indenture, it would operate by estoppel and become good for the companion's share; and if it was not by indenture, a Court of Equity, it is presumed, would compel the surviving joint-tenant, &c. to make a valid demise during the remainder of the term.

If one joint-tenant grants a lease for years of his share, reserving rent, and dies in the life-time of his companion without severing the joint-tenancy, (the lease itself not being a severance, except during the term,) it is held that the rent is determined, and neither belongs to the surviving joint-tenant or to the heir of the one deceased. See Bac. Abr. tit. Joint-Tenants, (I. 3.) But, perhaps, this doctrine is not to be understood of cases where the rent is reserved generally, without saying to whom; for where it is so reserved, there, it is conceived, the rent would be incident to the reversion, and would belong to the surviving joint-tenant to whom such reversion had survived; and if the rent is reserved to the deceased joint-tenant, his heirs and assigns, or to him, his executors, administrators and assigns, and the lessee covenants with the lessor, his heirs or assigns, or with him, his executors, administrators and assigns, for the payment of the rent, might not the heirs or executors maintain an action on the covenant and recover the rent?

(r) It is only where the husband and wife were joint-tenants for life by *entireties* that the lease would be bad in toto as against the wife; for if there were *moieties* between them, the lease would be good as against the surviving wife for one moiety. See supra, page 111, note (t), on the subject of husband and wife being seised by *entireties*.

(s) And in such a case the lease must be pleaded as the lease of the person seised in fee, and the surrender of the person seised for ten years, unless such lease was for a shorter period than the remainder of the ten years; in which case, it is conceived, it must be considered as the lease of the person possessed for ten years, and the confirmation of the person seised in fee.

by

by execution. And yet if a lease be made to me for years, I may make a lease of part, or an assignment of all the term, before I have made my entry into the land demised (t). So if the father die, and the son make a lease to a stranger of the land descended to him before his entry; this a good lease: but if a stranger had entered and abated into the land, and then the son had made the lease, *contra* (x).

By special power or proviso to make leases.

In some cases also such persons as are not seised in fee-simple, &c. nor able to derive such estates for life or years out of their own estates, may lawfully notwithstanding make such leases for life, &c. And this is sometimes by some special act of parliament enabling them so to do. And hence it is also that a tenant in tail may make leases for three lives or twenty-one years. And sometimes it is by some special power or authority that is given or reserved by and to the party himself, that had the fee-simple in him, or given to some other to do it in his name; and leases thus made, may be good. And therefore if any act of parliament enable a tenant in tail (x), or a tenant for life, to make leases for three lives, or twenty-one years; leases that are so made in pursuit of that authority, are good. And if a man be seised of land in fee, and convey it to the use of himself for life, or in tail, with divers remainders over, with a proviso that it shall be lawful for him, or any such tenant in tail, to make leases for twenty-one years; in this case he, or they, may make such leases, and they will be good. But in both these cases care must be had to pursue the authority strictly, i. e. that the leases made be according to the power and direction given by the statute or proviso; for if it differ and vary ever so little from the sense and meaning of the same, the lease will not be good. And therefore in the case before of a power to make leases for twenty-one years, if the party make more leases for twenty-one years at one time than one, they are all void but the first; because it is against the intent of the parties, though it be not against the words. And so if the power be to make leases for three lives; he cannot by this make a lease for ninety-nine years if three lives so long live. But if the power be thus, provided, &c. that he may make any lease in * possession or reversion, so as it doth not exceed the number of three lives or twenty-one years; in this case a lease may be made for ninety-nine years if three lives live so long (y). But where uses are raised by way of covenant, and in the deed there is a proviso, that the covenantor for divers good considerations may make leases for years; in this case, this power is void, and therefore no lease can be made hereupon: neither will any averment help in this

Co. 5. 5.
Dier, 357.
Co. 6. 2.
8. 70. 1. 173:
See in leases made by tenant in tail, *infra*.

* P. 270.

Averment.

(t) See *supra*, page 267, note (e), on the subject of an *interesse termini*.

(u) A person disseised can make no estate or interest at law, till he has revested the estate,—all he can do, at law, is to release to the disseisor. But an agreement entered into for a valuable consideration, would, it is conceived, be enforced in equity when he had revested the estate.

(x) See *infra*, page 277, on leases by tenants in tail, under the act of the 32 Hen. 8. c. 28.

(y) See *contra Whitlock's case*, 8 Rep. 70 (a), and 2 Strange, 992; and see also *Roe v. Pridemore*, 10 East's T. R. 158.

case.

case (a). And if a man have a letter of attorney, or 2. In respect
other of the manner
of the agree-
ment, and the
words whereby the same is set down : and what words will make an estate
for life or years.

(a) Though a lease made under a general power to grant leases contained in a covenant to stand reised cannot be sustained, even if made to a person who is of the covenantor's blood, (see *Mildmay's case*, 1 Rep. 175. *Cross v. Fausterditch*, Cro. Jac. 180. *Lady Dacre v. Hazel*, 1 Keb. 34. *Baynes v. Belsan*, Raym. 247.), yet under a special power to grant a lease to a person named in the deed and who is of the covenantor's blood, there perhaps, the lease may be good. See *Mildmay's case*, 1 Rep. 176. and *Goodtitle v. Petto*, Stra. 934. Under a general power to lease contained in a bargain or sale, a lease cannot be granted; though under a special power one may be granted to a person from whom a valuable consideration moved at the time of the execution of the bargain and sale. See Roll. Abr. 786. (M). Moore 547. The subject of leases under powers contained in family settlements and wills, being a very important one, it may be desirable to enter pretty fully into the consideration of it.

In the first place it may be observed, that although in making leases under powers contained in settlements and wills, all the requisites of the power should be strictly attended to, otherwise, at law, the lease will be void, at least against the remainder-man; yet in certain cases and under certain circumstances their non-observance will be aided in equity; or in other words, the lease will be considered as good in equity. Thus, if the power requires the lease to be under seal, and a seal is wanting; or to be attested by two witnesses, and there is only one; or in short, wherever there is any defect in the mere formal or ceremonial part of the exercise of the power, there equity will aid the defective execution and support the lease, as well against the remainder-man as against the party making it;—as against the latter indeed, it probably is generally good as a lease derived out of his interest. To support however a lease under a power, defectively executed, as against the remainder-man, the lessee, it would appear, must be a person who can be considered in the light of a purchaser for a valuable consideration,—as by paying a fine, where the power authorizes a fine to be taken, or by laying out money in improvements. See *Anon.* 2 Freem. 224. and see *Shannon v. Bradstreet*, 1 Sch. & Lef. 52.*

It may be proper to notice, that where a leasing power is defectively executed in the formal or ceremonial part of it, there is no doubt but equity would compel the party who defectively executes it to execute it properly. See *Shannon v. Bradstreet*, 1 Sch. & Lef. 59. And it is conceived, that where a Court of equity would support a defectively executed lease against the remainder-man, that there it would compel him to execute a fresh lease, so as to give the lessee a lease valid at law, so far as he (the remainder-man) had it in his power to grant such a lease. See *Stiles v. Cowper*, 3 Atk. 692. But though equity will aid a defect in the exercise of the formal or ceremonial part of a leasing power, yet where there is a defect in the exercise of the power in any essential part,—as in not reserving the best rent where the power requires the best to be reserved; or by granting the lease in reversion where the power only authorizes leases in possession; or by omitting to insert in the lease proper and usual covenants, where the power requires them to be inserted, (or as would appear, even where the power does not expressly require it;) in such cases as these, equity, generally speaking, grants no assistance; at least not as against the remainder-man, unless there should be something on his part which affords a ground on which to rest the interposition of equity—as fraud for instance. Thus, in the case of *Stiles v. Cowper*, 3 Atk. 392. (and see 1 Sch. & Lef. 73.) where a tenant for life granted a building lease under a power contained in a private act of parliament, but the lease did not contain the proper covenants on the part of the lessee, in consequence of which it was bad at law; but the remainder-man having suffered the lessee to lay out money in improvements after he (the remainder-man) came into possession of the property and after he had notice that the lease was bad, Lord Hardwicke compelled him to grant a new one. So long acquiescence in a lease by the remainder-man after he knew it to be bad, might be a ground for enforcing it against him. See Lord Redesdale's opinion, *Shannon v. Bradstreet*, 1 Sch. & Lef. 72.

Connected with the subject of aiding the defective execution of leasing powers, it may be proper to enquire, whether equity will enforce a contract for a lease entered into by a person having a power of leasing. As against the person entering into the contract, it is perfectly clear that equity will enforce the performance of it, provided it is a contract to grant such a lease as the power warrants, and provided the contract itself is such a one as a Court of Equity can enforce. And even if it is a contract to grant a lease such as the power does not strictly warrant, yet in some cases, equity,

* Though perhaps it cannot be considered as settled, that a lessee at rack rent and who has not laid out money in improvements is to be looked upon as a purchaser for a valuable consideration, though in the case of *Goodright v. Moses*, Blackst. 4022. the Court spoke of a lessee at rack-rent, as a purchaser for a valuable consideration,] yet as Courts of equity protect lessees at rack-rent against those claiming under prior voluntary settlements, and as they enforce agreements for leases at rack-rent although there has been no expenditure by the lessee; and, consequently, as in these instances they evidently consider such a lessee as something more than a mere naked volunteer, there appears to be great reason to contend that the defective execution of a leasing power would be aided in favor of a lessee at rack-rent.

it is conceived, will execute the contract *cy pres*—as if the power authorized a lease for twenty-one years, and the agreement was to grant one for thirty; in such a case as this, a lease for twenty-one it is presumed would be enforced: see *Campbell v. Leach*, Amb. 740. And where the power is to grant leases in possession, the circumstance of the agreement stipulating to grant one commencing on a future day, will be no objection to a specific performance of the agreement as against the party entering into it, provided he lives till the day appointed for the commencement of the lease. See *Shannon v. Bradstreet*, 1 Sch. & Lef. 52. If indeed the agreement was expressly to grant a lease in reversion, there it is conceived it could not be enforced; as to enforce such an agreement would be compelling the party to grant a lease which the power did not authorize, and which would not be binding upon the remainder-man; and the Court by enforcing such a lease might be subjecting the remainder-man to litigation and expence in order to get rid of it. See *Harnett v. Yielding*, 2 Sch. & Lef. 549. But though this appears to be a very satisfactory reason for refusing to enforce a specific performance in *toto* of an agreement to grant a lease, where the lease itself, if granted, could not be maintained against the remainder-man, yet as against the party entering into the agreement there is perhaps no good reason why it should not be enforced so far as it affected his own interest: as if, if it was entered into by a tenant for life, he should be compelled to grant a lease in conformity with the agreement, but determinable upon his death: [but see *O'Rourke v. Percival*, 2 Ball & Bea. 58, in which the Lord Chancellor seemed to be of a contrary opinion.] With respect to enforcing contracts for leases under powers, it might perhaps be laid down generally, that as against the party entering into the contract, it should be enforced in *toto*, provided the lease agreed to be made is such as is fully authorized by the power; but where it is not authorized by the power, that there the contract should either be enforced *pro tanto*, (as by making the lease determinable upon the death of the party entering into the agreement,) or should be enforced *cy pres*,—as where the agreement is for granting a longer term than the power warrants, there it should be enforced for such a term as the power does warrant. Where the donee of a leasing power executes the power, and covenants in the lease (as is sometimes done) to grant a future lease, there appears to be reason to think that such a covenant might be enforced against the covenantor in every case in which a contract or agreement to the same effect would be enforced;—such covenant in fact, being neither more or less than a contract or agreement. In the above noticed case however, of *Harnett v. Yielding*, (2 Sch. & Lef. 549. and see *Doe v. Bettison*, 12 East, 305.), Lord Redesdale refused to enforce a covenant, (contained in a lease at rack-rent,) to grant a further lease for twenty-one years at any time during the covenantor's life; and his Lordship's reason appears to have been, that he considered the covenant as amounting to an agreement to grant such further lease (though not so expressed) at the old rent; and that as it could not be known, at the time of entering into the covenant, that the old rent would be a full rent, the covenant was to be regarded as a fraud upon the power, and he therefore refused to enforce it. It might however be worth consideration, whether it might not in such a case be referred to the Master to ascertain whether the old rent would be a fair rent under the new lease, and if it was found that it would, then perhaps there could be no good reason why a performance of the covenant should not be enforced; * and even if the old rent should not be a fair one under the new lease, still, it is conceived, the performance of the covenant might be enforced so far as to compel the covenantor to grant a lease determinable upon his own death.

Whether agreements for leases entered into by the donee of the power, will be enforced against the remainder-man is a point it may be proper to enquire into. In the above noticed case of *Shannon v. Bradstreet*, (1 Sch. & Lef. 52) Lord Redesdale considered an agreement for a lease entered into by the donee of a leasing power, in the light of a defective execution of the power, and held that the remainder-man was bound by the contract. On the authority therefore of this case, and of what was said by the Master of the Rolls in the case of *Blore v. Sutton*, 3 Meriv. 247, perhaps the broad rule may be laid down,—that wherever the donee of the power enters into a clear, explicit, agreement for a lease, that there the agreement will be binding upon the remainder-man; at least where it was an agreement in writing. But where a parol agreement is entered into by the donee of the power, there it is apprehended, the remainder-man would not be bound, unless he did something which afforded a ground for the interposition of equity—as acquiescing in an expenditure made by the lessee after he (the remainder-man) came into possession, and with notice of the lessee's title being defective: see *Shannon v. Bradstreet*, 1 Sch. & Lef. 72. and see *Stiles v. Cowper*, 3 Atk. 392, and *Blore v. Sutton*, *ub. sup.* In the case of *Shannon v. Bradstreet*, Lord Redesdale seemed to consider, that long acquiescence in the lease on the part of the remainder-man after he had notice of its being bad might be a ground for enforcing it against him.

Having considered the subject of enforcing agreements for leases under leasing powers, and also that of aiding the defective execution of such powers, it may be proper to briefly advert to the subject of the excessive execution of such powers. If a lease under a power is granted for a longer term than the power authorizes, (which is an excess in the execution of the power) the lease on this account (though it may in all other respects be free from objection), will be bad at law. See *Roe v. Prideaux*, 10 East's Rep. 158. and see *Hardw. 398*. It will however be good in equity to the extent of the term authorized by the power, and is only bad for the excess. *Campbell v. Leach*, Amb. 740; and see 2 Ves. 644.

* This however could not be done unless the old rent was expressly mentioned, as the rent at which the new lease was to be granted, or by clear inference was evidently so intended; for where an agreement for a lease neither mentions the rent, or the means of ascertaining it, such agreement, as we shall afterwards see, cannot be enforced.

It is only however where an attempt is made to grant an *actual* lease for a longer term than the power authorizes that the lease is void at law; for if a lease is granted for a term which the power does authorize and a covenant is contained in the lease to grant a further term, the circumstance of the lease containing such a covenant (though the two terms exceed the term allowed by the power), will not at all affect the validity of the lease so far as respects the term actually granted. See *Doe v. Bettison*, 12 East's Rep. 305.* But though a lease under a power, cannot be sustained either at law or in equity for a *longer* term than the power authorizes, yet under a power which authorizes leases for any term *not exceeding* a certain period, it is quite clear that a lease may be granted for a *shorter* term than the period allowed by the power; and if the language of the power is to lease for a certain term, (as twenty-one years, but not saying for any term *not exceeding* twenty-one years,) under a power like this, a lease may be granted for a shorter period than twenty-one years. See *Isherwood v. Oldknow*, 3 M. & S. 382.

Unless the power should require that leases granted under it, should be for a term *absolute*, a proviso it is presumed might be inserted to make the term void, or for the lessor to re-enter in any case he might think fit to provide for. Such a proviso might be assimilated, it is conceived to a power of revocation, which it is presumed might clearly be inserted in a lease made under a power which does not require an absolute and irrevocable term to be granted. Indeed in *all cases* the usual power of re-entry for non-payment of rent and non-performance of the lessee's covenants may be inserted, or rather, it is conceived, *must* be insisted; especially where the power requires that the lease shall contain all usual covenants, powers, and provisos; and even where the power is silent upon this point, it would seem that all usual covenants, &c. must be inserted in leases made under powers.

It may be proper to notice, that if a leasing power is given to a tenant for life (without adding his assigns), and he conveys his life estate to another, in such a case as this, the power it is conceived is extinguished, and consequently cannot be exercised either by the tenant for life (*Coe v. Day*, 13 East's Rep. 118.) or the person to whom he has conveyed his life estate. In a case however, where a tenant for life with a power of leasing at rack-rent conveyed away his life estate to trustees to secure an annuity and to pay the surplus of the rents to himself, it was held that the power was not extinguished (though query of this), but that the tenant for life might still exercise it. *Rex v. Bulkley*, Dougl. 279. Where a leasing power is expressly given to a tenant for life and his assigns, there the assignee of the life estate may exercise the power. See *Hoo v. Whitfield*, 1 Vent. 358. and 1 Freem. 476.

Leasing powers in family settlements and wills generally require, that the leases shall be granted for not longer than a certain term or number of years to take effect in possession and not in reversion or by way of future interest. It has already been incidentally observed, that a deviation from the terms of such a power by granting a lease in reversion, or to commence in futuro, will render the lease bad at law, and generally speaking in equity also as against the remainder-man: And even where such a lease is for a short term, and would in fact expire before the expiration of the term allowed by the power, (as if the power allowed a lease in possession for twenty-one years, and a lease should be granted for ten years commencing one year hence,) yet this being a lease in reversion, or commencing in futuro, will not be good. See *Doe v. Calvert*, 2 East's Rep. 376. And if a reversionary lease is granted to a present lessee, and the terms of years in the old and the new leases do not together exceed the period allowed by the power, still the new lease, being a reversionary one, will not be good. See *Doe v. Lady Craven*, 6 Toml. Bro. P. C. 157. and 5 T. R. 570. But if a power authorizes leases in possession for any term not exceeding, for instance, twenty-one years, and a lease is granted for seven years, and so from seven years to seven years, till the expiration of twenty-one years, each future period of seven years is not a reversionary interest for so many years, but the whole is to be considered as constituting one period of twenty-one years, (see *Hennings v. Brabason*, 1 Lev. 45.) and the lease would therefore be good. Wherever the power requires that leases under it shall be granted so as to take effect in possession and not in reversion or by way of future interest, though it is clear that a lease in such a case, commencing in futuro is not, *prima facie*, good either at law or in equity, at least as against the remainder-man, yet circumstances might exist, (as fraud or long acquiescence in the lease on the part of the remainder-man after he knew it to be void,) as grounds on which to justify the interposition of equity in favor of the lessee. See *Stiles v. Cowper*, 3 Atk. 392. and *Shannon v. Bradstreet*, 1 Sch. & Lef. 57.

It will be proper to observe, that it is not merely where the power expressly requires leases under it to be granted in possession that leases made to commence in futuro are bad, for if a leasing power authorizes the granting of leases generally, without expressly saying they shall be made to take effect in possession, yet if the power only authorizes them to be granted for a certain term or number of years, there generally speaking, they can be only granted to take effect in possession. See *Countess of Sussex v. Wroth*, Cro. Eliz. 5. and *Sacombe v. Hawkins*, Cro. Jac. 318. If, indeed, there was a lease in being at the time of the creation of such a power, there it has been held, that a lease might be granted to commence at the expiration of the lease which was in being when the power was created. *Marquess of Northampton's case*, Dy. 357. and see 1 Com. Rep. 315. A contrary doctrine however, (and which, it is conceived is the sounder one) was laid down in the case of *Belson v. Baynes*, Raym. 247. The peculiar penning indeed of the power, might authorize a lease in reversion—Thus, where the language of the power was "so as there be not in any part of the premises so leased at any one time a greater estate

* If the covenantor lived till the time appointed for granting such further term, a performance of the covenant might probably be enforced against him. See the above note, where it treats on the subject of enforcing agreements for leases under powers.

than for twenty-one years,"—here, as the power did not expressly require leases under it to be granted in possession, it was held to authorize a lease in reversion for a term which with the existing term did not exceed twenty-one years: see *Cocentry v. Cocentry*, 1 Com. Rep. 313. And where the power does not expressly require leases under it to be granted in possession, and the language of the power is to lease for any term of years not exceeding a certain number (ninety-nine for instance) from the making of the lease, under such a power as this a future or reversionary lease may be granted, provided the term for which it is granted does not exceed ninety-nine years from the making of the lease. *Harcourt v. Pole*, 1 And. 273.

Where there is an express power to grant leases in reversion, it will hardly be necessary to observe that they may be so granted. 8 Rep. 69. Where a power is given to grant leases in reversion, a lease to commence after the determination of an existing lease is a lease within the true meaning of the power. Where, however, the power is to grant leases for lives in reversion, as a lease under such a power can only be granted for lives in esse, (see 6 Mod. 254. 378), such a lease will, strictly speaking, be rather a concurrent lease than a lease in reversion. So far, indeed, as respects the commencement of the lease in point of beneficial enjoyment, it may certainly be considered as a lease in reversion. As a power to grant leases in reversion, only authorizes, it is conceived, leases, made to commence after the determination of leases in existence at the time the new ones are granted, a lease merely commencing in futuro, without reference to any prior existing lease, would not be a lease within the true meaning of the power.

Under a power to grant leases in reversion as well as in possession, it is held, that a lease in possession and another in reversion cannot be granted of the same land at the same time. See 2 *Thomson's Co. Litt.* 436. Though query of this; for if a lease can be granted in possession, and a year afterwards, for instance, another can be granted (as it is conceived it may) to commence after the expiration of the former lease, why may not the two leases be granted at one and the same time?—there seems to be nothing either in the words or intent of the power to prevent it.

Where a lease is granted under a power which only authorizes leases in possession, if the donee of such a power grants a lease commencing but a single day after the granting or delivery of the lease, it is as much a lease commencing in futuro as if it had been made to commence a hundred years after its execution or delivery, and it can no more be sustained than if it had been made to commence a hundred years after. And if, under such a power, a lease is granted as to part of the lands to take effect in possession, and as to other parts to take effect at a future day, if the whole of the lands are granted at one entire rent the lease will be bad as to the whole. See *Doe v. Calvert*, 2 East's Rep. 375.

The question sometimes arises,—whether a lease is to be considered as a lease commencing in possession or in reversion. Where a lease is granted,—“to hold from the making,” or “from the sealing and delivery,” or “from henceforth,” or “from the date,” or “from the day of the date,” in all these cases the lease may be considered as a lease commencing in possession, provided there is no prior estate or interest in existence. See *Clayton's case*, 5 Rep. 1. *Higham v. Cole*, 2 Rol. Abr. 520, pl. 1. *Osborne v. Rider*, Cro. Jac. 135. *Freeman v. West*, 2 Wils. 165. *Pugh v. The Duke of Leeds*, Cowp. 714. *Hayter v. Ashe*, 3 Lev. 438. And where the lease mentions no time for its commencement, it is held to commence from its delivery, and is therefore a lease commencing in possession. Co. Litt. 46 b. And in the case of a lease for lives as well as of a lease for years, “to hold from the day of the date,” is a lease commencing in possession. *Hayter v. Ashe*, 1 Lord Raym. 4th ed. 84. It was indeed at one time held, that a lease to commence from the DAY of the date was a lease commencing in futuro, and consequently bad under a power which only authorized leases in possession. The case, however, of *Pugh v. The Duke of Leeds*, (Cowp. 714. and see *Ex parte Fallow*, 5 T. R. 283.) decided that such a lease is a lease in possession, and therefore good. However it is usual in well-drawn leases under powers to lease in possession, to make them commence from the day next before the day of the date; as this prevents all possibility of doubt as to their being leases in possession, at least leases in possession so far as respects the commencement of the term.

A lease made to commence in futuro under a power which only authorizes leases in possession, is clearly bad both at law and in equity against the remainder-man, unless there should be ground of equitable relief against him,—as fraud, (*Stiles v. Cooper*, 3 Atk. 392.) or long acquiescence in the lease after he knew it to be bad: per Lord Redenbale, *Shannon v. Bradstreet*, 1 Sch. & Lef. 7. It may sometimes happen however that a lease is in fact good, though on the face of it it appears to be bad—as where it is made to commence on a day subsequent to the date; here, on the face of it, it appears to be a lease commencing in futuro; but if the fact was that it was ante dated and was not in reality executed till the day, or till after the day on which the term was made to commence, then instead of being a lease commencing in futuro it would be a lease commencing in possession; for a deed or other instrument, it will be recollected, does not take effect from the day of its date but from its delivery or execution; and where a lease is ante dated parol evidence will be admitted to shew the fact. *Campbell v. Leach*, Amb. 740. *Doe v. Day*, 10 East's Rep. 427. *Doe v. Gezenove*, 4 East's Rep. 177. *Doe v. Robson*, 15 East's Rep. 32.

Under a power which requires that leases under it should be granted in possession, it is not sufficient it is conceived, that the term is made to commence in present or immediately, but in order to constitute a lease in possession within the true meaning of the power, the lessee should have immediate possession of the property. There are, however, authorities which countenance the opinion, that if the term is made to commence immediately the lease will be good notwithstanding there may be a prior lease in existence: see *Goodtitle v. Finucan*, Dougl. 551. *Read v. Nash*, 1 Leon. 147. And whilst the old lease is in existence the new one is denominated a concurrent lease*. The validity, however, of such

* On the subject of concurrent leases by bishops, see infra.

concurrent leases would appear to be very doubtful, and more especially as these are the opinions of eminent judges which warrant the opinion that they are bad. See *Edmas v. Ascough*, Latch. 233. *Threadneedle v. Lincham*, 3 Keb. 372. *Wilson v. Sewell*, 1 Blackst. 126. And in a more recent case, where a lease was granted commencing *in presenti* of lands which were in the hands of tenants from year to year, the court appears to have considered the lease as good, because the tenants received directions from the lessor, at the time of granting it, to pay their rents to the lessee: Dougl. 544. Though this appears to be a bad reason for supporting the lease, for if it was a valid one, the lessee had a right to receive the rents (being incident to the immediate reversion) without the tenants from year to year receiving any direction from the lessor for that purpose; yet it shews that the court did not choose to support the lease solely on the ground of its being a concurrent lease. But even supposing a concurrent lease to be good under a power which only authorizes leases *in possession*, yet if the power requires the best rent to be reserved, and the rent reserved by the concurrent lease is greater than the one reserved by the prior lease, the rent reserved by the new lease carries with it a *prima facie* evidence of its not being the best; for if the lessee pays money out of pocket before he comes into the enjoyment of the farm, (as he must do where he pays a larger rent than he is entitled to receive from the first lessee), it cannot be expected that he will pay so large a rent as he otherwise would have done when he does come into the enjoyment of it; and consequently the remainder-man must be prejudiced by such a lease. It may be proper however to observe, that under a power which requires leases to be granted *in possession*, a valid lease may clearly be granted to an existing lessee without any *express* surrender of the old lease, provided the new one is made to commence immediately, for the acceptance of the new one would be a surrender *in law* of the old one, and consequently the new one would, in the true meaning of the power, be a lease *in possession*. So if there is a prior lease in a third person, yet if the prior lessee surrenders it to the second lessee, the prior lease would then form no objection to the validity of the second; unless the prior one was not surrendered till *after* the granting of the second. There must however be an actual surrender of the old lease; merely cancelling it would not do, for cancellation would not put an end to it at law. See *Roe v. Archbishop of York*, 6 East's Rep. 86. If however the parties ignorantly acted under the impression that cancelling put an end to the old lease, equity, which affords its aid in the case of mistakes, would, it is conceived, hold the new lease to be good.

But though it is apprehended that, under a power to grant leases *in possession*, the lessee must have *immediate possession* of the property, or at least a right to the immediate possession of it, and consequently that concurrent leases are not good; yet in a case where a prior lease was determined at the time of granting the new one, but the lessee had a right to depasture some meadow till a future day, it was held that such a circumstance as this did not affect the validity of the new lease. See *Doe v. Snowden*, 2 Blackst. 1224.

Sometimes powers are given to grant leases either for lives, or for years determinable upon lives, or for years absolute. Under such a power, the donee of the power has his choice of the modes allowed. Under a power to lease for two or more lives, a lease may be granted for the allowed number of lives and the life of the longest liver, notwithstanding the power does not in express terms authorize it to be so granted: *Doe v. Hardwick*, 1 East's Rep. 549. And under a power to lease for one, two, or three lives, a lease may be made to one or more lessees for the lives of any three other persons and the life of the survivor, or it may be made to three lessees for their own lives and the life of the survivor: *Baugh v. Haynes*, Cro. Jac. 76. *Winter v. Loveden*, Ld. Raym. 368.

Where a power was given to grant leases for one, two, or three lives, or for the term of thirty years, or for any term or number of years determinable on one, two, or three lives; the question arose, whether a lease for thirty years *absolute* was good, and it was held that it was; each repetition of the particle "*for*" being considered to make so many distinct powers. Indeed, it could not be contended, according to any sound rule of construction, that the power to lease for thirty years only authorized a lease for thirty years *determinable on lives*, for where could be the necessity of giving a power to lease for a *particular number* of years determinable on lives, when a power was given to lease for *any number* determinable on lives? according to such a construction, the former power would have been involved in the latter, and would consequently have been nugatory; but as the former power could have a distinct operation not at all inconsistent with the latter, it was properly determined that the power to grant leases for thirty years authorized a lease for thirty years absolute, and not merely for thirty years determinable on lives. See *Winter v. Loveden*, 1 Com. 37. and see *Lutwick v. Piggot*, 3 Mod. 268. and *Roe v. Prideaux*, 10 East's Rep. 158. Under powers to grant leases for lives, such leases must be granted to persons *in esse* at the time of granting them: *Snow v. Cutler*, Sir T. Raym. 163. A lease under such a power for the life of the first son of J. S., who has no son then living, would be bad. See *Cress v. Fauserditch*, Cro. Jac. 180.

Though there are authorities to the contrary, yet it seems to be now settled, and properly it is conceived, that a power to lease for lives does not authorize a lease for years determinable on lives: *Whitlocke's case*, 8 Rep. 70. and 2 Stra. 992. and see *Roe v. Prideaux*, 10 East's Rep. 158. Leases for lives *under powers*, unlike common law leases for lives in that respect, may be made to commence *in futuro*, unless the power should expressly require that they should be made to commence *in possession*; and such leases taking effect under the statute of uses (except where the power operates upon mere trust estates or upon copyholds or leaseholds) they are properly created by an instrument operating as the *appointment or limitation of a use*.

Though powers in modern settlements and wills usually authorize the letting of all the lands comprised

prised in the settlement or will, (except, in some instances, the mansion house, pleasure grounds, &c.) yet it sometimes happens that the power only authorises leases to be granted of such lands as have been *usually demised*. In a leasing power so penned, it may be necessary to enquire what lands are to be considered as coming within its operation, or, in other words, what lands are to be considered such as have been *usually demised*. It would seem that lands which have been let two or three times, whether for lives, years, or from year to year, may be considered in lands which have been *usually demised*, and therefore as lands within the power. See *Right v. Thomas*, 1 Blackst. 446. 3 Burr. 1441. *Baugh v. Haynes*, Cro. Jac. 76. and see *Vaugh. 33*. But lands which have only been once let are not within such power; (2 Rol. Abr. 262, pl. 13.) at least if such letting was for a very short term: But though the letting has been for only once, yet if the term was a long one, the lands may in that case be considered to have been *usually let*, and consequently within the power; for it has been held, and properly it is conceived, that the expression *usually demised* may not only mean demised at different times by different acts of letting, but that it may also mean, demised or let for some continuance of time, though under one and the same letting. See *Vaugh. 28*. and see Bac. Abr. tit. Leases, I. 11. Where lands have been so demised that they may be considered as lands which have been *usually demised*, it is not material (with reference to leases under powers in private settlements and wills) by whom the lands may have been let; whether by persons seized of an estate of inheritance, by the courtesy, or in dower, &c. See *Dyer, 271*. It may however be proper to observe, that under the expression *usually demised*, the lands must have been let to the time, or at least nearly to the time of creating the power; and therefore it has been held, that lands which had not been let for twenty years before the creation of such a power were not within it. See *Tristram v. Lady Battingham*, *Vaugh. 28*. *Marriot v. Marriot*, 3 Vin. Abr. 429, pl. 9. q. 2.

Under a power to grant leases for one, two, or three lives, or for any number of years determinable on one, two, or three lives, of such of the lands as were then demised or granted for any such time; lands, comprised in a lease, by way of family provision, for ninety-nine years, determinable on several lives, of which *two* were in being at the time of the creation of the power, were held not to be within the power. See *Doe v. Holcombe*, 7 East's Rep. 713.

As closely connected with powers to grant leases of such lands as have been *usually let*, it will be proper to notice powers to grant leases of the lands comprised in the settlement or will generally, *reserving the old, or usual, or ancient, or accustomed rents*; and sometimes the *present rents*. Under such a power as this, it sometimes happens that part of the lands have not been previously let*, and consequently that as to such lands no such rent as the old, or usual, or ancient, or accustomed, or present rent can be reserved. In a case so circumstanced, the question arises, whether the lands which have not been previously let come within the power? In the earlier cases upon the subject it was held that such lands did come within it; on the ground, that the power being general (comprising all the lands); the qualification (that of reserving the usual or ancient rent) could not stand along with it; and as the power and qualification could not stand together, the latter was to be rejected and the power to remain in force; and, consequently, that the lands which had not been previously demised might be leased under the power;—and it was held that they might be leased at any rent the donee of the power might think fit. See *Comberford's Case*, 2 Roll. Abr. 262. *Winter v. Loveday*, 1 Ld. Raym. 267. *Walker v. Wakeman*, 1 Ventr. 294, and 2 Lev. 150. *Goodtitle v. Finnan*, Dougl. 553.

The doctrine however just noticed may be now considered as exploded; and whether the lands which have not been let are to be considered as within the power or not, is held to depend upon the intention, or presumed intention, of the donor of the power. Thus it was observed in the case of *Doe v. Rendle*, 3 Manl. & Selw. 90, "where it can be collected from the nature of the property not before demised, or from the character of the parties to whom the power is given (as to mere naked trustees), or from other circumstances, that the power was not intended to extend beyond what had been before demised, there it will be confined to such as had been previously demised." If the question; whether the power is or is not to be considered as extending to lands which have not been previously demised, is to depend upon the intention, or supposed intention, of the donor of the power, perhaps the nature of the property not previously demised may afford the best data on which to discover such intention. If, for instance, such property consisted of a mansion house, park, or pleasure grounds, or of a fishery or other things which might be considered as necessary or proper to be occupied with the mansion house,—here it might, perhaps, be supposed, that the donor of the power expected that the parties taking under the limitations of the settlement would reside in the mansion house and occupy the park, pleasure grounds, &c., and therefore it might be supposed, that the donor of the power did not intend that they should be demised, notwithstanding the comprehensive language of the power. Supposing, therefore, the intention, (where it can only be guessed at) ought in any case to have any influence at all, (and in questions upon powers such as we are speaking of, the circumstances of the case seldom afford ground for any thing more than a kind of loose conjecture as to what was the intention) the nature of the property not previously demised would seem to afford the best ground on which to ascertain the intention. If, however, this supposed intention of the donor of the power is to be the ground on which to determine the operation or effect of the power, it of course follows, that where it is to be presumed that the donor of the power intended that it should not extend to lands which had not been before demised, that there such lands

* What is to be understood by the expression "*not previously let*" will be noticed afterwards.

cannot

cannot be leased under the power. See *Doe v. Rendle*, 3 Manl. & Selw. 90. *Pomeroy v. Partington*, 3 T. R. 665. and *Bagot v. Oughton*, 8 Mod. 249. And on the other hand, where it is to be presumed that the donor *did* intend it to comprise the lands which had not been before demised, *there*, as we have seen, a lease of such lands may be made *under the power*; and *that* at any rent the donee of the power may think fit—a doctrine, however, which may, in its consequences, be so injurious to the interests of the remainder-man, that this alone, would afford a strong reason for contending, that lands which have not been previously demised *cannot in any case* be considered as within the operation of the power. If however it is to be held, (on the ground of supposed intention) that lands not before demised *may* be leased under such a power as we are speaking of, it would perhaps be more proper, or at least more consonant with a regard to the interest of the remainder-man, to hold, that the *best* rent must be reserved; and in doing this it is clear there would be no greater deviation from the terms of the power than in reserving any small rent the donee of the power may think fit. But it must be evident that a power such as we are speaking of must always be embarrassed with difficulties until the broad rule is established, that lands which have not been previously demised are not in any case within the power; for it may perhaps be contended that a lease, *which from the circumstances of the case, CANNOT be made agreeably to the terms of the power*, is no more a lease under the power, than a lease which might have been made agreeably to the power but which is *not* so made. In the latter case it is not a lease under the power, because the requisites of the power *HAVE not been complied with*, and in the former case it is not a lease under the power, because the terms of the power *CANNOT be complied with*; and in determining whether a lease is, or is not, a lease under a power, it can make no difference, it is conceived, whether the requisites of the power are not complied with, or *cannot* be complied with. In both cases, it must be clear, that the lease cannot be a lease *under the power*; and though equity may in the former case, in some instances support the lease, yet in the latter the lease should in every case be considered as bad, as against the remainder-man, both at law and in equity; except where there may have been fraud on the part of the remainder-man, or long acquiescence on his part after he knew the lease was bad. If any objection should be urged against the doctrine contended for on the ground that the intention of the donor of the power might sometimes happen to be frustrated, (though it will seldom be an easy matter to say what the intention was in such a case), it may, perhaps, be sufficient to say in reply,—that the donor of the power should have taken care to have expressed his intention in terms that could have been acted upon, but that not having done so his intention must be defeated; as is often the case with others, whose intentions are frustrated from not expressing them in terms sufficiently correct.

As there appears therefore reason to contend that lands which have not been previously demised, cannot be leased under a power which requires the ancient or usual, &c. rent to be reserved, it will be proper to consider *what lands* are to be considered as lands *which have not been previously demised*. Under a power which authorizes leases to be granted of lands which have been *usually* demised, we have before seen, that lands which have not been demised for the space of *twenty years* prior to the creation of the power, are considered as land which have not been *usually* demised, and consequently as lands which cannot be demised under the power; therefore, under a power which requires the old, or usual, or accustomed rent to be reserved, it is presumed that lands which have not been leased, *at a rent*, at any time within *twenty years* before the creation of the power cannot be leased under it, but that such lands must be considered in the same light with lands which have never been leased; and from the import which we shall presently see is annexed to the expression *old, or ancient rent*, such expression does not appear to militate against this opinion.

Where the donee of a leasing power requires the ancient, or usual, or accustomed rent to be received, and the lands have, on different lettings, been let at different rents, the question sometimes arises, *which of the rents previously reserved*, is to be the rent reserved on leases under the power. In the cases of *Powie v. Antrobus*, Hardr. 325, Lord Hale was of opinion, that by the expression "*ancient and accustomed rent*," the rent reserved by the lease in existence at the creation of the power, or if there was no such lessee, then by the lease made last preceding the creation of it, was to be the rent reserved by the new lease; and in the case of *Orby v. Lord Mohun*, (1 Prec. in Cha. 257,) Lord Holt expressed himself to the same effect (and see *Campbell v. Leach*, Amb. 740); but Lord Comper and Lord C. J. Trevor, seemed to think that the expression "*ancient and accustomed*" rent was to be considered as applying to the rent reserved on the oldest letting where there had been two or more lettings.

There appears, however, to be reason to think, that Lord Hale's opinion is the better founded one, and that by the expression "*ancient and accustomed*" rent, the rent reserved at the time, or nearest to the time of creating the power is to be the rent reserved by the new lease; for, as was observed by Lord Hale, the rent reserved at the time, or nearest to the time of creating the power, may be considered as the *ancient* rent in respect to the rent to be reserved by leases under the power; or in other words, that the rent reserved at the time, or nearest to the time of creating the power, may be considered as the ancient (or old) rent, as contradistinguished from the modern or new rent reserved upon leases granted under the power. Besides, the probability is, that the donor of the power in directing the ancient or accustomed rent to be reserved, must have had in mind the rent which he was in the receipt of at the time or nearest to the time he created the power, and not a rent which he or some other had been in receipt of at some more remote period. It may therefore, perhaps be considered as tolerably clear, that under a power requiring the "*ancient and accustomed*" rent to be reserved, a lease made under such a power must reserve the same rent as was payable at the time, or nearest to

to the time of creating the power; and that it would be the same, if the power merely required the "ancient rent to be reserved," without saying *ancient and accustomed*; or required "the old," "or usual," "or accustomed" rent to be reserved. Where the power requires the *present* rent to be reserved, it must be clear, that the rent to be reserved on the new lease, is the same rent as was payable at the time the power was created.—Where the power requires the ancient, or usual, or accustomed, or present rent to be reserved, it may be hardly necessary to observe, that the validity of a lease under such a power, is in no wise affected by reserving more than the ancient or usual rent. See *Sir C. Orby v. Lord Mohun*, 3 Ch. Rep. 78. It has even been held, (though query of the soundness of the doctrine), that reserving less than the ancient rent does not affect the validity of such a lease, where what is omitted to be reserved consists of things of a casual or accidental nature,—as *Herlots*. See *Coventry v. Coventry*, 1 Com. 312. and *Baugh v. Haynes*, Cro. Jac. 76. Co. Litt. 44 b. Where the tenant under former lettings paid taxes, made repairs, &c., it is conceived a lease under such a power as we are speaking of, would not be good unless these burdens (or an equivalent for them,) were thrown upon the new tenant.

It may be proper to notice, that where the power requires the ancient, or usual, or accustomed rent to be reserved, it is held, that not only the *same amount* of rent must be reserved, but that it must be reserved in the same form, and payable at the like periods with the old rent; though where the power requires the usual *yearly* rent to be reserved, there it is held, that it may be made payable, either yearly, half yearly, or quarterly, as the donee of the power may think fit. See Amb. 740. But the rent, except in cases such as the one just noticed or similar ones, must be reserved on the *usual* days of payment; as to reserve it either before or after the usual ones might be prejudicial to the remainder-man. *Ludlow v. Beckwith*, Al. 90. In the case indeed, of *Regina v. Weston*, (2 Ld. Raym. 1198.) it was held, that a reservation *before* the usual day of payment was good, but there seems to be great reason to doubt of this. Where the power requires the ancient, or usual, or accustomed rent to be reserved, leases under the power should *specify* the amount of the sum or other rent reserved;—it has been held, that a reservation of "the ancient or accustomed rent" (in the words of the power) is not good; (see *Duchess of Hamilton v. Mordaunt*, 1 Bro. P. C. 248. and see *Owen v. Thomas*, Cro. Car. 94.) though query of this, for if it could be proved what was the ancient or accustomed rent, would not the case come within the rule *id certum est quod certum reddi potest*? See *Roe v. Rawlins*, 7 East's Rep. 279. [See *infra*, in this note, on the reservation of rents.]

But though leasing powers sometimes require the ancient, or accustomed, or usual, or present rent to be reserved; yet generally speaking, the *best or most improved* rent is required to be reserved; with a prohibition against taking any fine, premium, or foregift. Where the power requires the best rent to be reserved, it will hardly be necessary to observe, that if the lessee gives any fine or premium, that there the best rent cannot be reserved, and consequently the lease is not a lease within the power. And if the lessee should covenant to lay out a sum of money in permanent improvements, and from which improvements, the lessee was not likely to get back the sum expended, *there* it is conceived, the rent could not be considered as the best rent; for the probability is, that had the lessee not bound himself to have expended the money in improvements he would have given a larger rent; and if the rent reserved is not the best rent the lease cannot be supported. See *Wright v. Smith*, 15 Esp. 203. It might, however, happen, that the improvements were of such a nature, as that the lessee himself would be principally benefited by them, and that the rent, notwithstanding the stipulation to lay out the money in improvements, was in fact the best that could be obtained, and if such was the case there can be no doubt but the lease would be good; at least so far as its validity depended upon the reservation of the best rent. See *Shannon v. Bradstreet*, 1 Sch. & Lef. 52. If a building or repairing lease is granted under a power which requires the reservation of the best rent*, *there* the very nature of the lease requires that the lessee should covenant to lay out money in building or repairing, and consequently the circumstance of the lease containing such a covenant, forms no objection to its validity; but if the lessee should neglect to perform his covenant, and the lessor brought an action for breach of the covenant and recovered damages, a Court of equity would not allow him to put the damages in his pocket, but would require them to be laid out in building or repairing. See *Shannon v. Bradstreet*, 1 Sch. & Lef. 52. and *Campbell v. Leach*, Amb. 740. It would seem, that if an existing lessee surrenders his old lease, and takes a new one at an increased rent, that in such a case as this, the rent reserved by the new lease cannot be considered as the best rent, and that the lease is not good, though the contrary has been determined. See *Wilson v. Sewell*, 1 Blackst. 617. Suppose the lessee has a term of ten years at a rent of 100*l.* a year, and he takes a new lease for twenty years at a rent of 200*l.*; in this case, it is clear he had an interest to the extent of 100*l.* a year for ten years to come, and it can hardly be supposed he would give up this interest merely for the sake of extending his term:—where the lessee surrenders an old lease and takes a new one at an increased rent, the evident meaning of the parties is, that the lessee shall pay the lessor an increased rent during the *existing* term, and that the lessee shall have a *further* term at a lower rent than the lessor would otherwise have expected. If, indeed, the former term was nearly expiring, and the increased rent was not considerable so that the lessee could not be considered to have given up any thing of much value, in that case there would be no very strong *prima facie*

* The expression *best rent*, in a power to grant building leases, means the best that can be obtained with reference to the circumstances of the case—as the length of the term for which the lease is granted, the probable sum to be expended by the lessee, &c.

evidence that the new rent was not the best—the making sure of a further term even at a full or fair rent might be a sufficient inducement with the lessee to give up his former interest where it was not of much value. However, in cases like these, or in cases where the lessee stipulates to lay out money in improvements (not being a repairing or building lease) much must depend upon the circumstances of the case; and if a jury should find that the rent reserved was in fact the best rent, notwithstanding the covenant to lay out money in improvements or notwithstanding the giving up a beneficial interest under a former lease, the new lease would be good; though where the money was to be laid out in permanent improvements, (or perhaps not intended to be laid out at all but to enable the lessee to recover so much money in the shape of damages for breach of the covenant), or where the interest given up by the lessee is considerable, in none of these cases, it is conceived, could a jury come to the conclusion—that the new rent was the best that could be obtained.

Where the best rent is to be reserved, it is absolutely necessary that nothing in the shape of a fine or premium should be received—receiving the first half year's rent immediately, and a making every future payment half a year in advance would amount, in effect, to taking a fine, and the lease would be bad; but if the lessee has been in the occupation of the property from a day past, then reserving the rent so as to be payable at the expiration of the half year from the period his occupation commenced forms no objection to the lease. See 3 *Maul. & Sel.* 383.

Where a lease is granted without taking any fine or premium and without fraud, the circumstance of the rent reserved not being the best that might have been obtained is not in itself a circumstance which will invalidate the lease. Thus where a lease at a rent of 43*l.* a year was granted under a power which required the best rent to be reserved; the validity of the lease was objected to on the ground that the lessor had rejected two specific offers, one of 50*l.* a year, and another of from 50*l.* to 60*l.* from other tenants, whose responsibility could not be disproved;—the lease, however, was held to be good; the court observing, “that in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered, and that the best rent meant the best that could reasonably be required by a landlord taking all the requisites of a good tenant for the permanent benefit of the estate into the account.” *Doe v. Radcliffe*, 10 East's Rep. 278. [Query of the above decision, as the circumstances of the case did not bear out the reasoning of the Court, but rather the reverse; as there was no evidence that the persons who offered larger rents than the person to whom the property was let, were at all wanting in “the requisites of good tenants.”]

It has been held, that where the power requires the best rent to be reserved, but from the nature of the property it is impossible to say what is the best, that there a lease under the power cannot be supported; as where the donee of a leasing power leased a honour, sixteen manors, a park and deer therein, and other property by one lease at 600*l.* a year; the lease was considered as bad on account of the uncertain value of the greater part of the property and the consequent impossibility of ascertaining that the rent reserved was in fact the best rent. See *Earl of Cardigan v. Montague*, Sugd. Pow. Append. No. 9. [Though query, if the value of each part of the property could have been ascertained if contained in a separate lease, where was the impossibility of ascertaining the entire value of the whole?]

Where the power requires the best rent to be reserved, leases under the power should, generally speaking, ascertain or specify the rent to be paid:—reserving “the best improved rent” would not do. *Orby v. Moken*, 2 Vern. 531. 3 Ch. Rep. 56. If however the reservation is made in such a way that the amount of the rent can be clearly ascertained, this will be sufficient—as if the lease reserved a rent of so much an acre, and so in proportion for a greater or less quantity than an acre. *Shannon v. Bradstreet*, 1 Sch. & Lef. 52. So where a power required 12*d.* an acre to be reserved for every acre demised by any lease under the power, and a lease was made reserving “all the rent intended to be reserved,” (by the power is to be inferred,) and it was held that the lease was good. See *Levison v. Pigot*, cited 3 Ch. Rep. 76.

It sometimes happens that property comprised in a power of leasing, and property not comprised in such power are demised by the same lease. Where several distinct rents are reserved, and such a rent is reserved for the lands comprised in the power as the power required to be reserved, there the circumstance of such lands being demised with other lands forms no objection to the lease; but if the lands comprised in the power, and the other lands are demised at one entire rent, the lease will be bad as to the lands comprised in the power; for the remainder-man is not to be put to the trouble and expence of an apportionment before he can recover his rent; but whether the lease is bad as to the other lands, is a point upon which the authorities do not appear to agree. See *Doe v. Myler*, 3 Maul. & Selw. 276. and see *Doe v. Rendle*, 3 Maul. & Selw. 99.

If a rent of so much an acre is reserved for all the lands, (for those within as well as those not within the power) there, in order to ascertain the rent for each part, no apportionment would be necessary, and, consequently, it is apprehended the lease would be good as to the whole; supposing the rent reserved was the best rent, or the ancient rent, according as the power required it to be one or the other. See *Campbell v. Leach*, Amb. 740.

It may be proper to notice, that in leases of mines, granted under a power which only requires the reservation of a rent generally, or of the best rent, without saying any thing about the nature of the rent, that there a part of the mines themselves may be reserved by way of rent. See *Campbell v. Leach*, Amb. 740.

In leasing powers, it is usual to say, that the rent shall be incident to and go along with the reversion expectant on the determination of the term for which the premises are demised; and in cases under such powers the rent is generally reserved to the tenant for life, and after his decease to the

the person or persons who for the time being shall be entitled to the reversion of the premises immediately expectant upon the determination of the term created by the lease. It is however well settled, that a reservation to the tenant for life *his heirs and assigns* is a good reservation; and the person for the time being entitled to the reversion expectant upon the term will be entitled to the rent. See *Whitlocke's case*, 8 Rep. 69 b. *Hotley v. Scot*, (Lofft. 316; and see Dougl. 572. *Campbell v. Leach*, Ambl. 740. It is not however unusual to reserve the rent during the term generally, without saying to whom; "as yielding and paying therefore yearly and every year, during the said term of twenty-one years, the yearly rent or sum of £^s [—], of lawful money of, &c. by four equal quarterly payments, on the [—] day of, &c. in each and every year;" and it has been said, that this is the best and most sure way, and that where the rent is so reserved the law will give it to the person who is entitled to the remainder immediately expectant upon the term granted. See *Whitlocke's case*, 8 Rep. 59 b.

Where leasing powers require, as they usually do, that leases under them shall contain a covenant for payment of the rent and all other usual or reasonable covenants on the part of the lessee, and a power of re-entry in case of the non-performance of the covenants, or for non-payment of the rent by so many days, and that the lessee shall execute a counterpart of the lease*, and that he shall not be made dishonourable of waste; in such cases care must be taken that the terms of the power are complied with in all these respects, otherwise the lease will be bad both at law and in equity. And even a slight deviation from the spirit and intention of such requisites will prove fatal to the lease. Thus in the case of *Hotley v. Scot*, (Lofft. 316. and see also *Coze v. Day*, 15 East's Rep. 118.) the power required that leases under it should contain a clause of re-entry on non-payment of the rent for twenty-one days; but in a lease made under the power the clause of re-entry was, "in case the rent should be behind for twenty-one days, having been lawfully demanded, and no sufficient distress found upon the premises;" and this departure from the power was held to be fatal to the lease. In the late great case of the *Earl of Jersey v. Smith*, (3 J. B. Moore's Rep. 339.) a power was given by a marriage settlement to lease for lives or years determinable on lives, such parts of the lands as were then leased for lives or years determinable on lives, but so as there was contained (amongst other requisites to the validity of leases under the power) in every such lease a power of re-entry for non-payment of the rent to be thereby reserved: the settlement also contained a power to lease other lands for years absolute, so as there was contained (amongst other things required to the validity of leases under this power), a power of re-entry for non-payment of the rent by the space of twenty-eight days after it became due. A lease was granted under the former power, with a clause of re-entry for non-payment of rent by the space of sixteen days after it became due, and if no sufficient distress could be found upon the premises; and upon a question, whether the lease was good; after several elaborate arguments in the Exchequer Chamber, it was decided by four judges against three, that it was bad†. Where the power authorizes a clause of re-entry for non-payment of rent in case no sufficient distress can be found upon the premises, and a lease under the power is made accordingly; no re-entry can be made unless every part of the premises is searched for a distress and cannot be found. *Powell v. King*, Forrest. 19.

It has been held, that where the power requires the lease to contain all usual covenants, that there such covenants as were contained in old leases (leases it is presumed subsisting at the time the power was created) must be inserted in the new ones, otherwise they will be bad; and where usual covenants are required by the power they must be actually inserted; a lease containing a clause that the lessee should be liable to all usual covenants will not do. See *Orby v. Molau*, 5 Ch. Rep. 76. Though it seems, that by the expression *usual covenants*, covenants contained in old or existing leases of the property are to be understood where there are any such leases, yet supposing there should be none then it is apprehended, the expression must be understood to mean covenants usually inserted in leases of property of the like nature‡. Where the power requires "proper covenants," or "reasonable covenants," or "proper and reasonable covenants"—covenants must be inserted in leases under the power adapted to the nature of the property or the circumstances of the case. Thus, in a building lease, under a power which required proper or reasonable covenants; a covenant to build § and to keep in repair, and perhaps to insure, ought to be inserted. See *Jones v. Verney*,

* Where a counterpart is required, the lessee should not only take care to execute one, but he should also take care to be provided with the means of proving, at any time during the continuance of the lease, that there was one;—an indorsement upon the part in the lessee's hands, signed by the lessor, admitting that a counterpart was executed, would perhaps be the best mode.

† The editor has been informed, that on an appeal to the House of Lords, the decision of the Exchequer Chamber has just been reversed,—seven of the Judges being in favour of the reversal, and five against it.

‡ The subject of covenants to be inserted in leases generally, (not merely in leases under power) is considered in a subsequent part of the chapter.

§ Leases under powers to grant building leases, should not only provide for the actual erection of houses, &c. but the description of the houses or other buildings should be clearly defined or ascertained, otherwise a court of equity would not be able to enforce the building of them, nor could a jury know what damages to give in case an action should be brought for non-performance of the agreement to build.—But this subject will be afterwards more fully noticed in treating of agreements for leases. Under a power to grant "building leases," a lease was granted without any agreement to erect new buildings, but a covenant was contained on the part of the lessee to keep the premises demised, (which consisted of old houses,) "or such other houses as should be built during the term," in repair, and it was held that this was not a building lease within the meaning of the power, and therefore void. See *Jones v. Verney*, Willes, 169.

- other authority to make leases for another, and he doth make them accordingly; such leases are good. But herein also caution must be had of three things: 1. That the authority be good. 2. That he that is the deputy or attorney do pursue the authority strictly. 3. That he do it in the name of his master, and not in his own name (b).
- Co. 6. 72. A lease made for a thousand days, months, or weeks, is Livery of sei-
 4 H. 8. 13. as good, for so long as it endureth, as a lease for an hun-
 Plow. 422. dred or a thousand years. So a lease for half a year, or a
 Plow. 272. whole year, is good. So if a lease be made from day to day,
 Bro. Leases 49. or from week to week, for four years; this is a good lease
 Dier, 24. for four years, *et sic de similibus*. So if one make a lease
 for ten years, and so from ten years to ten years, during
 an hundred years, or until an hundred years are incur-
 red; this is a good lease for an hundred years (c). So if
 one make a lease from three years to three years, during
 the life of *I. S.* in this case if livery of seisin be not
 given,

Willes, 169. And in an agricultural lease, proper covenants respecting the cultivation and management of the farm ought to be contained. In leases under powers, not only all usual, or proper, or reasonable covenants on the part of the lessee must be inserted, but in a recent case it was laid down, that if the lease contains any unusual or improper one on the part of the lessor, that the lease will be bad, notwithstanding the power should be altogether silent respecting covenants on his (the lessor's) part. Thus, where the lessor covenanted, that in case the premises were burnt down, he or the person for the time being entitled would rebuild, or in default of doing so the tenant might quit the premises and should be discharged from the rent; and it was held at law, that the lease was bad against the remainder-man; and upon an application by the lessee to the Court of Exchequer to have the covenant expunged and the lease set up again the bill was dismissed. See *Doe v. Sandham*, T. R. 700. and *Sandham v. Medwin*, Excheq. Hilary Term, 1789.

Where a power required the best rent to be reserved, and that the lease should contain usual covenants, but without expressly saying on the lessee's part, a lease was granted in which the lessor covenanted to repair a mansion house, and if he neglected to do so that the lessee might make the repairs and deduct the expence out of the rent; and it was held that the lease was good, the jury finding that the rent was the best rent, and that the covenant on the lessee's part was a usual one; and the court properly observed, that if the burden of the repairs had been thrown upon the lessee he would have given less rent. See *Doe v. Bettison*, 12 East's Rep. 305. It may be proper to observe, that even where the power is silent as to leases under it containing usual covenants on the part of the lessee, power of re-entry, &c., still such covenants, power of re-entry, &c. must be inserted, otherwise the leases, it would seem, will be bad. See *Taylor v. Horde*, 1 Burr. 60.

Before concluding the subject of leases under powers contained in family settlements and wills, it may be proper to observe, that in order to the validity of such leases, there is no absolute necessity or any express reference to the power, for if the lease is made in conformity with the terms or requisites of the power, this is all that is necessary to its validity both at law and in equity. 2 Co. Litt. 41. and see *Campbell v. Leach*, Amb. 740. and see 10 Mod. 36. And, (as we have seen before) a deviation from the power in the formal or ceremonial parts of it—as attestation by one instead of two witnesses, the lease being made by deed-poll instead of by indenture, &c., will not affect the lease in equity; at least where the lessee can be considered in the light of a purchaser, for a valuable consideration; and even in favor of a lessee at rack rent and who could not, either from having laid out money in improvements or otherwise, be considered as a purchaser for a valuable consideration, even in his favor a court of equity it is conceived would supply such omissions as these.

A power to grant leases may be given to a feme covert, and leases in exercise of it will be valid wherever they would have been valid if made by a feme sole.

In concluding the subject of leases under powers, it may be observed, that a lease under a power may be granted to a trustee, in trust for the donee of the power. See *Wilson v. Sewell*, 1 Blackst. 617. *Taylor v. Horde*, 1 Burr. 60.

(b) A lease made by the attorney in his own name is void at law. *Fontin v. Small*, 2 Lord Raym. 419. It is presumed, however, that it would be good in equity, and that a court of equity would compel the lessor to grant a lease which was valid at law.

(c) With respect to the duration of leases, it may be observed, that a lease for such a term as both parties shall agree upon, is merely a lease at will. Bac. Abr. tit. Lease (L. 3.) Though if a rent is reserved on such a lease, it will be regarded as a tenancy from year to year. See *supra*, page 267, note

given, this is a good lease for six years (d); but if livery be given, it is a good lease for the life of I.S. And if

mate (f). And a lease "for one year, and so for two or three years, or for any further term of years, as the lessor and lessee may think fit and agree, after the expiration of the said term of one year," this is a good lease for two years, and after every subsequent year begun, it is not determinable till that is ended. *Harris v. Evans*, 1 Wils. Rep. p. 262.

A demise, "not for one year only, but from year to year," constitutes a tenancy for at least two years, and cannot be determined by a notice to quit at the end of the first year. *Denn v. Cartwright*, 4 East's Rep. 29. And if such a lease is not determined by proper notice at the end of the second year, it will be a tenancy for another year, and so from year to year until determined by due notice. See *Goodright v. Richardson*, 3 T. R. 462. A lease for three, six, or nine years, is a lease for nine years, determinable at the end of three or six years. See *Goodright v. Richardson*, 3 T. R. 462. And where such a lease does not specify by which party it may be determined, the lessee alone will have the right to determine it. See *Denn v. Sparrier*, 3 Bos. & Pul. 399, and *Dee v. Dixon*, 9 East's Rep. 15; and see also *Price v. Dyer*, 17 Ves. 363, where the point arose upon an agreement for a lease. If no certain term or definite period is mentioned, the lease will only operate as a tenancy from year to year, even though from the language of the instrument and the circumstances of the case, it should be pretty evident that the parties intended a more durable interest. Thus in the case of *Warner v. Browne*, 8 T. R. 166. an agreement was entered into between *Warner* and *Browne*, by which *Warner*, in consideration of 40l. paid in hand, agreed to let a house to *Browne* at a rent of 40s. a year. *Warner* agreed not to raise the rent, nor turn *Browne* out, so long as the rent was duly paid, and as he (*Browne*) did not sell any article injurious to *Warner* in his business; and it was agreed, that in case of removal (voluntary removal on the part of *Browne* it is presumed was meant) he (*Browne*) should be at liberty to receive the said sum of 40l. from the next tenant *Warner* should accept. Though there had been no breach of the stipulations on *Browne's* part, yet about five years after entering into the above agreement, *Warner* gave him notice to quit, and brought an ejectment to recover possession, and the Court of King's Bench was of opinion, that the interest of *Browne* not being for any certain defined period, was only a tenancy from year to year. [The Court observed, that it could not be an estate for life, not being created by a mode applicable to the creation of such an estate.] After the decision at law, *Browne* filed a bill in the Court of Chancery for a specific performance, and for an injunction against *Warner* taking possession under the verdict in ejectment; and the Lord Chancellor being of opinion that something more was intended than a mere tenancy from year to year, granted the injunction till the hearing; and his Lordship appeared to be of opinion, either that *Warner* should repay the 40l. or execute some lease, though for what term or period his Lordship gave no opinion. What finally became of the case does not appear. See *Brown v. Warner*, 14 Ves. 156. and *ibid.* 409. See the next note for further information relative to "the duration of leases."

(d) Where a lease was made for one year, and so from year to year, during the life of the lessor, it was held, that it was merely a lease for two years, or at most for three. Bac. Abr. tit. Leases (L. 3.) And in the case of a lease for three years, and at the end of those three years for other three years, and so from three years to three years during the lessor's life; it was held to be only a lease for twelve years, and not for the whole period of the lessor's life. See Bac. Abr. tit. Leases (L. 3.)*. But a lease granted from twenty-one years to twenty-one years for the term of 99 years, (and it would be the same if granted from year to year, or from three years to three years, for the term of 99 or any other definite number of years,) will be good for the whole of the 99 years. See *Manchester College v. Trafford*, Bac. Abr. tit. Leases (L. 3.) Plowd. Rep. 275. 523; and Brook, tit. Leases.

Perhaps there may be some reason to think that the distinction between a lease for a certain number of years absolute, (as three for instance), and so from three years to three years, during the life of the lessor or other person; and a lease for three years absolute, and so from three years to three years during the term of 99 years, holding in the former case, that the lease is only good for nine years, though the lessor should outlive that period, and in the latter, that the lease is good for the whole of the 99 years, is not a tenable distinction; for it would seem, on the true construction of the words, "for three years, and so from three years to three years during the life of the lessor," that the lease should be considered as a lease for three years absolute, (whether the lessor may die within the time or not), and if he survived the first three years, then as a lease for as many more successive periods of three years each as may accrue during the lessor's life; but that the period in which his death occurs is determinable by that event: and though the lease, according to such a construction, would be certain to continue during the lessor's life, not only in point of moral but of legal certainty, yet the interest which would pass by such a lease would, it is conceived, be nothing more than a *chattel in*

* In a case similar to that last noticed, (see *Keble*, 760 and 768.) the lease was held to be a lease for only nine years.

if a lease be made from my death until *Anno Domini*, 1650; this is a good lease.

Co. 6. 26. If I say to *I. S.* being in my house [here *I. S.* I demise Livery of seisin to you my house and land so long as I live:] this is a *sin*. good lease for life to him, if livery of seisin be made (e).

Et sic de similibus.

1 Ass. pl. If one make me a lease of land until an hundred pounds Livery of seisin paid me, and make livery of seisin upon it; this is a *sin*. good

erest, and consequently there could be no objection to the validity of the lease, on the ground that it was not made by a mode adapted to the creation of an estate of freehold. That such a lease is not a lease for life, in the proper technical acceptation of the term, notwithstanding it is certain to continue during the lessor's life, will be the more apparent when it is considered that it is granted for successive periods of a certain number of years each, and though those periods of years are made to follow one another indefinitely, so long as the lessor lives, still they are but so many successive terms of years, and the lease must therefore necessarily be a lease for years and not for life. By construing such a lease as we are speaking of as a lease for three years absolute, and for as many further successive periods of three years each as may accrue during the life of the lessor, full and complete effect is given to the intention of the parties; but according to the decisions in the cases above noticed, the intention is liable to be almost entirely frustrated; for where a lease is made for three years, and so from three years to three years during the life of the lessor, the intention clearly is to make a lease for three years absolute, and for as many succeeding periods of three years as accrue in the lessor's lifetime; but that the period in which the lessor's death may occur (except it occurs in the first), shall determine by his death. According, however, to the above noticed cases, the lease would be a lease for nine years absolute, and for no longer though the lessor survived that period; and for no less though he died within it*;—thus, in one event, giving the lessee a larger interest, and in the other less, than was intended. Suppose a lease was made for twenty years, and so from twenty years to twenty years during the lessor's life; according to the doctrine in the above cases, the lessee would be entitled to a term of sixty years, notwithstanding the lessor died in the first year of the term;—putting the case in this way may place the subject in a stronger point of view. It may not perhaps be proper to advert to the doctrine that was laid down in some of the cases we are considering, viz. that if livery of seisin had been given, the lessee would have taken an estate for life. With reference to this doctrine, it may be asked, on what principle could livery of seisin (made, we presume *per formam doni*) convert a mere chattel interest (which is all the lessee would have taken without such livery) into an estate of freehold? If livery of seisin necessarily created an estate of freehold, then the doctrine which was advanced is certainly a sound one; but livery may be made of a less interest than of an estate of freehold. See 2 Bla. Com. 310. To hold that livery of seisin will give an estate of freehold where a term of years is only granted, would have the effect of destroying such term, and of making the lessee's interest very different from what the parties intended; for in such a case it can hardly be doubted but the term of years was the interest really intended to pass, and that the livery was made under a mistaken notion of its being necessary.—No operation therefore ought to be ascribed to the livery. In Co. Litt. (48. a.) it is laid down that if a man make a lease for years by deed, and delivers seisin according to the form and effect of the deed but the livery is void, and that the lessee has but an estate for years.

It may be observed, that where it is intended to grant a lease for years, to continue during the lessor's life (as appears to have been the intention in the cases just noticed), the proper way is to grant it for a long term, (99 years for instance) "if the lessor lives so long;" or saying, "but determinable upon the death of the lessor."

Where a lease was granted for forty years, if the lessor's wife or any of their issue lived so long, it was held to be a good lease for the forty years till determined by the death of the lessor's wife and all their issue. See Bac. Abr. tit. Leases (L. 3.) But it seems, that a lease for forty years to two, if hey (not saying, or either of them,) live so long, determines by the death of either of them. Bac. Abr. tit. Leases (L. 4.) In the case of a freehold lease to two for their joint lives it would be otherwise.

(e) There must be a writing now to give validity to such a lease—livery alone will not do. See supra, page 267, note (d).

* In the reports of the above noticed cases, the court spoke of the term which they held to pass by the lease as an absolute term: In a case indeed in 1 Dyer, 24 a. they spoke of the term as determinable by the lessor's death. In this case a lease was granted for three years, and after the end of the three years to the end of other three years, and after the end of the said three years to the end of other three years, "during all the time of the natural life of the lessor," and it was held, that the case took an estate for nine years, if the lessor so long lived.

good lease for life, determinable upon the payment of the hundred pounds. But, if no livery be made, it is no good lease (*f*).

Executors.

If one make a lease to me for my life, and for four, ten, or twenty years after; this is a good lease for life first, if livery of seisin be made, and then a good lease for years, for so many years as are agreed upon afterwards, which my executors shall have. And if no livery of seisin be made; yet it seems it is a good lease for so many years after my death.

Bro. Leases
27. 51.

If an indenture of lease be made between *A.* of the one part, and *B. C.* and *D.* of the other part, and therein *A.* doth demise land to *B.* to have and to hold to him for eighty years, if *B.* shall live so long, and if he die, or alien the premises within the term, then that his estate shall cease, and then the lessor doth grant the land to *C.* for so many years of the said term as shall be then to come after the death or alienation of *B.* if he [*C.*] live so long; in this case this is a good lease to *B.* for so many years as he shall live of the eighty years; but the lease to *C.* after is not good, for the term is ended by the death of *B.* (*g*) but if the words of the second demise be, to have and to hold during the residue of the eighty years, and not during the residue of the term; in this case the second demise is good to *C.* also (*h*).

Co. 1. 153.
Dier, 253.

* P. 271.

If one make me a lease for sixty years if I live so long; provided that if I die within the term, that my executors shall have it during the residue of the sixty years; in this case, this is a good lease for the sixty years determinable upon my death, but not a good lease for the residue of the sixty years after my death (*i*). And yet it may amount to a good covenant for that time.

Co. 1. 153.
Dier, 150. 253.

Covenant.

If *A.* covenant to levy a fine to *B.* and his heirs; provided that if he pay to *B.* and his heirs ten pounds at the end of thirteen years, that then the fine shall be to the use of *A.* and his heirs; and *A.* doth covenant with *B.* by the same deed, that *B.* his heirs, executors, and assigns, shall quietly hold the premises from *Michaelmas* next, for thirteen years, and yearly from thenceforth for ever, if the ten pounds be not paid according to the intent; in this case, this covenant doth not make a good lease for the thirteen years, and it is but a covenant (*k*).

Evan's case,
Trin. 5 Jac.
B. R.

(*f*) But if no livery is made, yet if the lease is in writing, the lessee will have a chattel interest until the 100*l.* is paid. See Co. Litt. 42, a.

(*g*) In the case of *Wright v. Cartwright*, (1 Burr. 282,) where a term of years was granted to *A.* if he should so long live, and if he died within the term, then that *B.* should have the remainder of it; it was decided, that the remainder to *B.* was good. And the decision, it is conceived, is a tenable one, for though it is true, that in order to the validity of a lease there must be certainty both in the commencement and duration of the lessee's interest, yet that certainty need not be a positive and immediate certainty, for the rule is, *id certum est quod certum reddi potest*; and in the case just noticed, both the commencement and duration of *B.*'s interest was certain to be ascertained if *A.* died within the term. It may be proper to observe, that the above case is materially different from the limitation of a term *in esse* to one if he shall live so long, with remainders over to another.

(*h*) This appears to be an over refined distinction and would not now be attended to.

(*i*) See last note but one, *contra*.

(*k*) But by virtue of the fine *B.* would acquire the legal estate not only for the thirteen years but in fee; and unless *A.* paid *B.* the ten pounds at the end of the thirteen years no use would arise in his (*A.*'s) favor, but the legal fee would remain in *B.*

Plow. 272.
Lit. sect.

If one make a lease for a certain number of years, and Covenant.
it is further agreed that upon some contingent the lessee shall have the fee-simple, and livery of seisin is given hereupon; in this case, the lease for years doth continue good for the time agreed upon.

Co. 2. 24. 10.
37.

A lease for years cannot by the agreement of the parties be made to the heirs of the lessee, nor intailed to the heirs of his body. And therefore if a lease be made to *I. S.* and his heirs, or to *I. S.* and the heirs male of his body; yet the executors of *I. S.* and not his heirs, shall Executors.
have it, and the executors may sell the term (*l*).

Per Justice
Jones, at the
assizes at
Glouc.

If two agree by word, that one of them shall have such a piece of land for twenty years; this is a good and perfect lease that is made by this agreement, albeit they do agree to have a writing made of it afterwards; for in this case the writing is but the confirmation of it (*m*). But if the agreement be, that such a writing shall be made, or that a lease shall be made of such a thing between them and put in writing, so that the agreement hath reference to the writing, and implieth an intent not to perfect the agreement until the writing be made; in this case, the lease is not a perfect lease until the writing be made (*n*).
Albeit

(*l*) If an existing term of years is devised or assigned to one by words which, if applied to an estate in fee-simple, would have created an estate tail; in such a case the party will take the term absolutely, unless there is a limitation over upon an event which must happen (if at all) within the period allowed in the case of executory devises. See *Fearne's Executory Devises* for several cases connected with this subject; page 470, *et infra* (Mr. *Butler's* ed.)

(*m*) A writing now necessary; see the statute of Frauds, 29 Car. 2. c. 3.

(*n*) The question frequently arises, whether a particular instrument is to be considered as an actual lease, or as a mere agreement for a lease. We have already seen, that to constitute an *actual lease or demise*, no formal words are necessary, but on the contrary, that very slight and informal expressions are sufficient for the purpose. See *supra*, page 266, note (*b*). This however is to be understood of cases where the parties clearly intended an actual present demise, and not a mere contract or agreement for a future demise. The question however frequently arises upon informal ill-drawn instruments, whether such instruments amount to actual leases or to mere agreements for leases. Many of the cases which have arisen upon the point, do not appear to be exactly reconcilable to each other, nor do they seem to furnish any clear principle, or well-defined rule of construction as applicable to it. It may however be laid down, it is conceived, that where the instrument contains no words of present demise, nor even the words "agrees to let" or "demise," or words of the like import, but merely that the lessor *agrees to grant a lease*, that there the instrument will only amount to an *agreement* for a lease, and not to an *actual lease*. *

Where however the instrument contains words of actual demise, as that the lessor "hath granted and demised," or "doth grant and demise," or words of the like import; there the instrument will amount to an *actual lease*, even though it may contain an agreement for granting a future lease; for such agreement cannot, it is conceived, defeat the operation of the formal words of demise which the instrument contains. See *Baxter v. Brown*, 2 Bl. Rep. 973. *Harrington v. Wise*, Cro. Eliz. 486. *Barry v. Nugent*, cited 5 T. R. 165. *Tidals v. Essex*, Hob. 34. *Maldon's case*, ib. 33. but see *Bac. tit. Leases*, 164. and *Sturgeon v. Paynter*, Noy 128, *contra*; and in *Doe v. Ashburner*, 5 T. R. 163, it was determined that an agreement to grant a future lease, prevented the words *shall enjoy*, from amounting, as they otherwise would have done, to an actual demise: Still however, it is conceived, that a stipulation for a future lease would not defeat the operation of formal technical words of demise. Where however the instrument contains no formal words of demise, but merely that the lessor "agrees to demise," or "let," or the like, there the instrument may be an *actual demise* or an *agreement* for a demise, according as it is to be collected from the general tenor of the instrument, whether the parties intended it to be the one or the other. It may be proper however to remark, that

* Where an instrument set forth the terms and conditions upon which four separate farms were to be let, (and which instrument does not appear from the case to have been ever signed by the lessor) and at the bottom of it the lessor signed his name, stating, "I agree to take lot I. upon the terms and conditions above-mentioned," was held to be a mere agreement for a lease.

although

Albeit the most usual and proper making of a lease is by the words, demise, grant, and to ferme lot, and with an *habendum* for life or years, yet a lease may be made by

Co. *super LR.*
5. F. N. B.
270. c. Bro.
Leases, 71.

although the words "covenant," or "agree" to "let" or "demise," or words of the like import, may amount to an actual lease in a demise for a mere term of years, yet they cannot possibly amount to an actual demise in a lease for life, or lives. See *Doe v. Browne*, 8 East's Rep. 165. and *Browne v. Warner*, 14 Ves. 158.

The cases of *Pool v. Bentley*, 13 East's Rep. 168. *Doe v. Groves*, 15 East's Rep. 244, are authorities in which it was held that an instrument in which the lessor "covenanted or agreed to let, grant, or demise," was an actual lease, notwithstanding it contained an agreement for a future lease; the courts regarding such future lease in the light of a further assurance. Perhaps, however, it may be difficult to discover any very satisfactory ground for the decisions in the above cases, in which there appears to be little or nothing savouring of an actual present demise, but on the contrary, every thing tending to shew that the parties contemplated a future act as necessary, in order to give the lessee a sufficient title to the property intended to be leased. Indeed, where the lessor covenants or agrees to let or demise, it must be tolerably clear that a future act is intended; for covenantee or agreeing to do a thing, cannot, upon any sound principle of construction, be regarded as actually doing it; therefore where a party merely covenants or agrees to LET, it must be clear that he means to do so by some future act; consequently where such is the language of an instrument which contains no words of actual demise, it appears difficult to regard such instrument as an actual demise, and still more difficult where the instrument contains a stipulation to grant a future lease.* The cases therefore, in which such an instrument has been held to amount to an actual demise, are perhaps of a doubtful character, more especially as there are other cases with which, it is conceived, they cannot be easily reconciled. see *Dowding v. Bissell*, 3 Taunt. 65. *Doe v. Ashburner*, 5 T. R. 163. *Goodtitle v. Way*, 1 T. R. 735. *Doe v. Smith*, 6 East's Rep. 530. and *Browne v. Warner*, 14 Ves. 413. *Pleasance v. Higham*, 1 Roll. Abr. 848. Perhaps where an instrument contains a stipulation for a future lease, such instrument ought always to be considered as a mere agreement for a lease, and not an actual lease, except indeed it also contains clear unequivocal words of actual demise: And perhaps such a circumstance as the instrument being upon a proper lease stamp, (which appears to have had some influence in some of the cases) should be altogether disregarded; for the nature of the instrument should be determined, it is conceived, according to the intention of the parties (as that intention is to be ascertained by the language and import of the instrument) without any regard to the stamp with which it is impressed; for a circumstance which could not possibly have influenced the construction when stamps did not exist, ought not, it is conceived, to influence it now. Suppose an instrument framed with all the technical accuracy of an actual lease was upon a mere agreement stamp, it could never be held that such an instrument was not an actual demise. It is true, the instrument could not be given in evidence as a lease till properly stamped, but still it would be a lease and not a mere agreement for a lease. So, an instrument which could only be considered as an agreement for a lease if put upon an agreement stamp, ought never, it is conceived, to be considered as an actual lease from the circumstance of its being upon a deed stamp †.

It may be right to observe, that parol evidence cannot be admitted to shew whether the parties intended an instrument to be an actual lease or a mere agreement for one. [The cases in which it has been held that instruments, apparently mere agreements for leases, were nevertheless actual demises, renders it proper to observe, that wherever a lease is prepared in pursuance of an obscure instrument, which might possibly itself be considered as an actual lease, if such future lease is not granted to the lessee himself but to some one by his appointment (as is frequently the case in leases granted in pursuance of building contracts), care should be taken that the first lessee should join in the granting or operative part of such future lease, and not be a mere directing party; for if the first instrument amounts to an actual lease, it must pass the legal estate, which must consequently be vested in the first lessee, and therefore to vest it in the person to whom such future lease is made, the first lessee must join in the demise made to the second.]

The present may be a proper place to consider the subject of enforcing a specific performance of agreements for leases. Where an instrument is clearly a mere agreement for a lease, if it sufficiently ascertains the property agreed to be demised, and the terms upon which the lease is to be granted, either party may, generally speaking, compel the other to a specific performance of the agreement. If however there should be fraud, or mistake, or any thing that render the agreement evidently unfair and inequitable, a Court of Equity would render no assistance to the fraudulent party, or to the party wishing to take advantage of such mistake, &c. [On the subject of agreements tainted by fraud, mistake, &c. see Mr. Sugden's Treatise on Vendors and Purchasers; and see *O'Rourke v. Percival*, 2 Ball & Beat. 58. An actual lease may be set aside on such a ground; see *Willen v.*

* The expression, (by parol) "I agree to let you such a farm," might it is conceived, amount to an actual lease; but covenanting or assenting in writing to do a thing, pretty clearly shews that the parties meant it to be actually done by some future act.

† An *ad valorem* stamp is now necessary in leases.

by other words; for whatsoever word will amount to a grant, will amount to a lease. And * therefore a lease * P. 272.
may

Willan, 16 Ves. 72; and, in cases of gross fraud, leases will be set aside, although there may have been acts of confirmation. *Say v. Barrick*, 1 Ves. & Be. 195.] It will be proper to observe, that where a party seeks a performance of a *written* agreement, he must take care that it is executed agreeably to the statute of Frauds (29 Car. 2. ch. 3), which enacts "that all leases, estates, interests of freeholds, or terms of years, or any uncertain interest of, in, to, or out of, any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents, thereunto awfully authorized by writing, shall have the force and effect of leases, or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding—except nevertheless all leases not exceeding the term of three years from the making thereof whereupon the rent reserved to the landlord during such term, shall amount to two-third parts, at the least, of the full improved value of the thing demised." And the 4th section enacts, that no action shall be brought whereby to charge any person upon any contract, or sale of lands, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized *.

Agreements for leases should not only be made according to the statute, but they should sufficiently ascertain or describe the property agreed to be demised, the term or number of years for which it is to be leased, the time at which the lease is to commence, and the rent to be paid. It is of the greatest importance that the agreement should be sufficiently clear upon these material points; and it might be advisable that it should also specify what covenants it should contain on the respective parts of the lessor and lessee; and, if it is intended that the lessee shall not assign without the lessor's consent, it will be proper that it should be specifically mentioned in the agreement; for unless it is the lessor has no right to require a covenant to be inserted in the lease, restraining the lessee from assigning. Even a clause in the agreement that the lease shall contain "all usual covenants, clauses, or provisions on the part of the lessor," will not entitle the lessor to have a covenant or proviso inserted in the lease against assigning. Where a written agreement omits to specify the term or number of years for which the lease is to be granted, parol evidence cannot be adduced to supply the omission†. See *Clinan v. Cooke*, 1 Sch. & Lef. 22; and see *Kirley v. Duck*, 2 Vern. 684. In all cases, therefore, where an agreement omits to ascertain the term for which the lease is to be granted, a court of equity cannot enforce a specific performance of the agreement; and if the lessee has been let into possession, he will only be considered as tenant from year to year; and after giving the proper notice to quit, the lessor may bring an ejectment and recover the possession. See *Doe v. Browne*, 8 East's P. R. 165. [In this case a very obscure agreement was entered into, without specifying the term for which the lease was to be granted. The lessee paid a premium. The lessor, after giving notice to quit, brought an ejectment, and obtained judgment: The lessee filed a bill in equity to restrain the lessor from proceeding under the judgment, and for a specific performance of the agreement. The Lord Chancellor granted the injunction, and, upon a motion to dissolve it, refused to do so; his Lordship observing, that he thought the contract might be so construed as to afford a remedy to the lessee, as by decreeing that the lessor should either repay the premium, or grant some lease that would enable the lessee to recover at law. How the case was finally disposed of does not appear from the report. See *Browne v. Warner*, 14 Ves. 156. 408.] Though an agreement, where the term is neither named nor the means of fixing it specified, cannot be enforced, yet if an agreement is entered into to grant a lease for such a term as A. B. shall name, and he accordingly names one, there a court of equity will

* What shall be considered as a contract or agreement in writing within the meaning of the statute, and also what shall be considered as a *signing*, being subjects fully treated of by Mr. *Sugden* in his valuable work on the Law of Vendors and Purchasers, the Editor begs to refer to it for information upon these subjects.—It will be seen from the treatise just referred to, that letters may amount to an agreement, within the meaning of the statute; and letters or memorandums written subsequently to a parol agreement (written by the party against whom a specific performance is sought), will be admitted as evidence, to shew that there had been an agreement; and where there has been a substantial part performance of such parol agreement, the evidence of a single witness will be sufficient to support the plaintiff's bill, though denied by the answer; but this subject is more fully treated of below.

On the subject of *signing* agreements it may just be noticed, that if an agreement for a lease is only signed by one of two or more joint tenants, tenants in common, &c. it will only be binding, generally speaking, upon the party signing it; but in a case in Com. Dig. tit. Agreement 2, c. 1, it was held, that an agreement for a lease by a Dean and Chapter, though signed by the Dean alone, should bind the Chapter.

† On the subject of supplying omissions in written agreements by parol evidence, and also on the subject of admitting such evidence to alter or vary written agreements, and to explain latent and patent ambiguities, Mr. *Sugden's* Vendors and Purchasers should be consulted.

may be made by the word "give," "betake," or the like. The word *locavit* also is a good word. And the use in the Exchequer

will compel the lessor to grant a lease for the term named. See *Stukeley v. Butler*, Hob. 174. If, however, *A. B.* should refuse to name a term, in that case a court of equity, it is conceived, could render no assistance. See *Blundell v. Brett*, 17 Ves. 242. So, if instead of refusing to name a term, he should name one which was unreasonably long, much longer than it is fair to presume the parties had in contemplation, a court of equity, it is apprehended, would refuse its aid, and not enforce a lease for such unreasonable term. See *Emery v. Wase*, 5 Ves. 846; and see 19 Ves. 432. [Wherever it is agreed that the term should be fixed by a third person, it might be proper to express "for such a term or number of years as *A. B.* shall name, but not exceeding the term of so many years, and not being less than the term of so many years."] Not only ought the agreement to ascertain the term for which the lease is to be granted, or at least point out the means by which it may be ascertained, but it should also specify the time at which it is to commence, for its omitting to do so might be fatal to obtaining a specific performance. Parol evidence will not be admitted in such a case; (*Pym v. Blackburne*, 3 Ves. 34, and see *Blorc v. Sutton*, 3 Meriv. 246;) but if there is any circumstance from which it can fairly be inferred that the parties intended the lease to commence at any particular period, a court of equity will make such inference, and direct the lease to be granted accordingly. See *Pym v. Blackburne*, 3 Ves. 34. Letting the lessee into possession might, perhaps, be a circumstance from which it might be fairly inferred that the time at which he was let into possession was the period at which the term was to commence. And where an agreement is entered into for a new lease, with a tenant already in possession, if the agreement was entered into but a short time either before or after the expiration of the old lease, it perhaps might be inferred that the expiration of the old lease was the period at which the new one was to commence; but there does not appear to be the same ground for any such inference, where the agreement for the new lease is entered into several years either before or after the expiration of the old one. See *Pym v. Blackburne*, 3 Ves. 34.

Omitting to specify the amount of the rent, would be an omission equally fatal to a specific performance of an agreement for a lease, as the omission of the term for which the lease is to be granted; and parol evidence, it is presumed, could not be received in such a case. See *Woolam v. Hearne*, 7 Ves. 211. Neither can the amount of the rent reserved by a written agreement be altered by parol evidence*. See the case last cited. It may be proper to notice, that if it is part of a written agreement that the rent shall be fixed by a third person, after the rent is so fixed the agreement may be enforced just the same as if the amount of the rent had been fixed by the agreement itself; unless, indeed, the party fixing it should name an evidently unreasonable rent; in which case a court of equity, it is presumed, would not enforce the agreement. See *Gourlay v. Duke of Somerset*, 19 Ves. 432.

As agreements for leases should ascertain with precision the property to be demised, the number of years for which it is to be demised, the time at which the term is to commence, and the amount of the rent, and also the material covenants, provisoes, &c.; so, in addition to these particulars, in agreements for building leases, the nature of the buildings should be specified with sufficient clearness, otherwise the agreement cannot be enforced. Thus, an agreement to lay out a certain sum in building, without specifying the nature of the building, cannot be enforced. See *Moseley v. Virgin*, 3 Ves. 184.

In the case, indeed, of *Allen v. Harding*, (2 Eq. Ca. Ab. 17,) an agreement by a curate to build a house on the glebe of land was enforced, although the agreement did not specify the kind of house which was to be built. It would seem, however, that the decision in the case just noticed is to be ascribed to the circumstance, of the agreement being intended for the benefit of the church; and therefore, as the Lord Chancellor observed, ought, if it possibly could, to be performed. In the case, however, of *Virgin and Moseley*, Lord Eldon appears to have disapproved of the decision in *Allen v. Harding*, and not, it is conceived, without great reason; for where the kind or description of building is not specified, what ground or data can there be on which to enforce the agreement? and, whether it may relate to building on church property, or on any other, can make no difference; and parol evidence, as to the kind of building, ought not to be admitted.

In the case of *Lucas v. Comerford*, 3 Bro. C. C. 167, Lord Thurlow expressed himself of opinion that there could be no specific performance of an agreement or covenant to rebuild or repair: and, in the case of *The City of London v. Nash*, 3 Atk. 515, a similar doctrine appears to have been advanced. But if an agreement to rebuild specifies with sufficient clearness, what kind or description of houses the new ones are to be, there seems to be no reason why a specific performance of an agreement to rebuild should not just as soon be enforced as an agreement to build. There appears to be no well-founded distinction between the cases. So, with respect to an agreement (or covenant) to repair, if the nature and extent of the repairs are sufficiently ascertained, there would seem to be no good reason against a specific performance of the agreement; and Lord Erskine, in the case of *Sanders v. Pope*, 12 Ves. 282, and Lord Eldon in *Moseley v. Virgin*, 3 Ves. 184,

* With respect to admitting parol evidence to alter or vary written agreements, see Mr. Sugden's *Vendors and Purchasers*.

^a Bro. Leases which is a good word to make a lease. ^d And if A. do but

and *Hill v. Barclay*, 16 Ves. 405, may be considered as having expressed themselves dissatisfied with the doctrine—that there could not be a specific performance of a covenant or agreement to rebuild or repair. Perhaps, therefore, where a covenant or agreement to rebuild or repair sufficiently specifies what kind or description of houses the new ones are to be, or the nature and extent of the repairs which are to be made, there may be little doubt but a specific performance would be enforced.

The Statute of Frauds, as we have already seen, enacts, that leases or interests in land, created by parol, exceeding three years, shall have the effect only of leases or estates *at will*, ANY CONSIDERATION FOR MAKING THE SAME NOTWITHSTANDING: and the Statute expressly says, that they shall only have this effect in *equity* as well as at law ^b.

Courts of equity, however, (though how far properly is another thing) in certain cases enforce the performance of parol agreements for leases, notwithstanding such agreements are for terms exceeding three years†. The cases in which they do this, are cases in which there has been what is termed a *substantial part performance* of the agreement. This substantial part performance is held to take the case out of the statute, on the ground of such substantial part performance *itself* affording an evidence that there has been *some* agreement; and consequently the fact of there having been an agreement, does not rest upon mere parol evidence. Such substantial part performance, therefore, in itself shewing that there has been *some* agreement, parol evidence is let in for the purpose of shewing the nature and terms of such agreement‡. See *Frame v. Dawson*, 14 Ves. 388. In order to ascertain in what cases courts of equity will enforce parol agreements for leases exceeding three years, we must endeavour to ascertain what is to be considered a *substantial part performance*; an enquiry which, it is feared, will not, from the discordancy of the cases, be attended with so satisfactory a result as might have been wished. And first, it may be observed, that the lessee *taking possession*, and *paying a fine*, or *laying out money in improvements*, pursuant to an agreement for the purpose, is considered as a substantial part performance. See *Lester v. Foxcroft*, Colles's Sup. to Bro. P. C. 108. *Floyd v. Buckland*, 2 Freem. 268.

According to the *Earl of Aylesford's* case, 2 Stra. 783, and the case of *Kine v. Balfe*, 2 Ball & Be. 348, *taking possession* is alone a substantial part performance, and a ground on which to enforce a specific performance; consequently, where a lessee enters into possession in pursuance of a parol agreement, there needs no such concurring circumstance, as the payment or expenditure of money, in order to take the case out of the Statute. But it seems that an old tenant continuing in possession in pursuance of a parol agreement for a new lease will *not* take the case out of the Statute, and consequently will *not* afford a ground on which to enforce a specific performance. In the case of *Morphett v. Jones*,

* The Editor is aware that it is the fourth section of the statute which is considered to apply to the case of *contracts or agreements* for leases, and not the first and second. There is however great reason to think that an erroneous opinion prevails in this respect. An attentive consideration of the fourth section will shew, it is conceived, that such part of the section as relates to lands, only relates to contracts for the SALE of lands, and not to contracts for leases. This would be tolerably evident, if the words "contract or sale," were read "contract FOR sale." The word "or" seems to be an evident error. The language of the section, as it stands, is hardly either sense or grammar; but substitute the word "for" in the place of the word "or," and the language and meaning become clear and plain. But even admitting this correction, it might perhaps still be contended, that the fourth section relates to contracts for leases, on the ground that a contract for a lease is a contract for the SALE "of an interest in lands"—a lease being a *partial sale*. But this, it is conceived, would be a very strained and unnatural construction of the words. If, then, the fourth section only relates to contracts for the sale of lands, viz. for the sale of lands in the common acceptation of the word "sale," then it must be the first and second sections of the act, and those only, which relate to *contracts for leases*; or, if it should be contended, that these sections only relate to actual leases, or *demises at law*, then, in fact, there would seem to be reason to contend that the statute does not relate at all to contracts or agreements for leases; and that such contracts are left altogether unprovided for. It is conceived, however, that the first section is comprehensive enough, both in its letter and spirit, to embrace *contracts* for leases, as well as actual *demises* operating at law. The Editor, therefore, in his subsequent view of the doctrine relative to contracts or agreements for leases, has considered it as affected by the first and second, and not by the fourth section of the Statute of Frauds.

† The Editor has met with no case in which a court of law has decided that a parol lease for more than three years is good; and yet this, perhaps, might be as properly done, in cases where such acts are performed as afford evidence of there having been a parol demise, as for courts of equity to enforce a performance of a parol agreement for a lease, because of the performance of similar acts.

‡ It might perhaps be thought, that if parol evidence can be admitted to shew the nature and terms of a parol agreement, where there has been a part performance of such agreement, that parol evidence might be admitted in the case of written agreements to supply such omissions, as the term of years, rent, &c.; but this we have seen is not done.

but grant and covenant with *B.* that *B.* shall enjoy such a piece of land for twenty years; this is a good lease for twenty

v. Jones, 1 Wils. C. C. 109, the Master of the Rolls observed, that continuing in possession amounted to nothing; and in the case of *Willis v. Stradling*, 3 Ves. 381, the Lord Chancellor observed, that "the fact of continuing in possession would not weigh." But though continuing in possession will not take a parol agreement for a new lease out of the Statute, yet the expenditure of money in improvements, in pursuance of a stipulation to do so, would amount, it is presumed, to a substantial part performance, and would consequently take the case out of the Statute. The case of *Pilling v. Armitage*, 12 Ves. 78, (and see *Robertson v. St. John*, 2 Bro. C. C. 140) seems to be an authority for this opinion; for it may be inferred, that a parol agreement for a new lease, entered into with a tenant in possession, would have been specifically enforced, on the ground of expenditure in improvements in pursuance of the agreement, had it not been for the circumstance of the agreement being only proved by one witness, and positively denied by the answer; and the practice of courts of equity is, to dismiss bills where the facts are only proved by a single witness, and denied by the answer, unless there are circumstances which discredit the answer, and countenance or support the facts stated in the bill. But though the case of *Pilling v. Armitage* is not a direct decision upon the point under consideration, yet such seems to be the fair conclusion to be drawn from it—at least, such appears to be the conclusion to be drawn from it where the expenditure is in making such improvements as may fairly be referred to, or considered to result from an agreement on the subject, and not merely such as a tenant from year to year, or under an existing lease might possibly voluntarily make without any agreement*; for in such a case the expenditure could not be considered to afford in itself any evidence of there having been any agreement; and in order to take a parol agreement out of the Statute, the part performance must consist of the doing of something which in itself affords an evidence of there having been some agreement, (see *Frame v. Dawson*, 14 Ves. 388) otherwise the whole case would rest upon parol evidence, and consequently would be too palpably within the Statute to admit of any doubt.

But though the expenditure of money in improvements, in pursuance of a stipulation to do so, will, it is conceived, take a parol agreement for a new lease out of the Statute, yet the expenditure of money in improvements merely on the faith of a parol agreement for a new lease, will not do so. It is true, there are authorities the other way†; but, as was observed by the Master of the Rolls, the expenditure in such a case not being in pursuance of the agreement can be no part performance of it; and, as we have already seen, in order to take a parol agreement out of the Statute, there must be a substantial part performance of it. And in the case of laying out *Robertson v. St. John*, 2 Bro. C. C. 140, the Lord Chancellor observed, that the circumstance of money after the agreement, as it was voluntary, could not vary the nature of the case. So a parol agreement for a new lease, in consideration of money voluntarily expended previous to the agreement, cannot be enforced. *Robertson v. St. John*, 2 Bro. C. C. 140.

A parol agreement for a new lease is not taken out of the Statute by the payment of a fine‡; nor is it, it is conceived, by the payment of an increased rent. In the case, indeed, of *Willis v. Stradling*, 3 Ves. 381, the Lord Chancellor seemed to lay some stress upon the circumstance of the payment of an increased rent; but perhaps there is less reason why the payment of an increased rent should take a parol agreement out of the Statute, than that the payment of a fine should do so. If indeed, a parol agreement can only be taken out of the Statute on the ground of a substantial part performance, and if such part performance must consist of some unequivocal act, tending in itself to show

* If the expenditure is in making improvements which the lessee would have been obliged to make without any stipulation to do so, such an expenditure will not take a parol agreement out of the statute. Thus, in the case of *Frame v. Dawson*, 14 Ves. 386, a tenant in possession, and who was under a covenant to keep in repair generally, having discovered that a party-wall was in a very bad state, applied to his landlord to contribute to the expense of repairing it, but which he refused to do; but in consideration of the expense which the lessee would be put to in making the repairs, he agreed to grant him a further term. Upon a bill for a specific performance of this agreement (which was merely a parol one), the Master of the Rolls observed, that the act was not an unequivocal act, for it would have equally taken place if there had been no agreement: so that the doing of that which must have been equally done if there had been no agreement, could not be considered as affording any evidence of the existence of an agreement for a further lease; consequently the existence of an agreement for a further lease rested solely upon parol evidence, and therefore could not be enforced. Had the party-wall been rebuilt by the lessee after the expiration of the original lease, it would then, it is conceived, have afforded evidence of an agreement for a further lease, and a performance of the agreement would have been enforced, it is presumed.

† See *Toole v. Medlicott*, 1 Ball & Be. 401. *Gregory v. Meghill*, 18 Ves. 328; and see *Hollis v. Edwards*, 1 Vern. 159, and, per Master of the Rolls, *Pilling v. Armitage*, 12 Ves. 88.

‡ See *Cooke v. Clinan*, 1 Sch. & Lef. 22. This case arose upon an agreement for an original lease; but if the payment of a fine will not take a parol agreement for an original lease out of the statute, neither can it, it is conceived, take an agreement for a renewed lease out of it. On the question whether the payment of part of the consideration-money will take a parol agreement out of the statute, see Sugd. Vend. & Pur.

¶ Mic. 9 Jac. twenty years. *So if A. promise to B. to suffer him
B. R. Curia. to enjoy such a piece of land for twenty years; this is a
good

show that there has been some agreement, (see *Frame v. Dawson*, 14 Ves. 388)—and which act, it is presumed, must be an act manifest and notorious to the world, and not itself resting upon parol evidence,* then such a circumstance as the payment of an increased rent or of a fine, cannot possibly amount to a substantial part performance, because it cannot be considered as possessing that *notoriety* which, it is conceived, an act constituting a substantial part performance ought to possess; for the very fact itself of the payment of the increased rent must be proved by parol evidence, and therefore *in itself* can afford no evidence of any agreement. It may therefore, perhaps, be treated as tolerably clear, that a parol agreement for a lease will not be taken out of the Statute, either by the payment of a fine or increased rent.

The result of what has been said appears to be, that a parol agreement for a lease will be taken out of the statute *by a substantial part performance of the agreement*, and that such substantial part performance must consist of the doing of something which may be fairly referred to, or be considered as resulting from, some agreement; (see 14 Ves. 387) of something, in fact, which *IN ITSELF* shows that there has been some agreement. Taking possession may be considered to do this, and so may the laying out money in improvements, in case the improvements are more than such as a mere tenant at will, or tenant under an existing lease, might be supposed to make voluntarily, without any agreement on the subject. But perhaps these are almost the only cases which can be fairly considered as amounting to a substantial part performance, within the true meaning of the expression “a substantial part performance.” But though taking possession, or laying out money in improvements, may amount to what is considered a substantial part performance of a parol agreement, still such an agreement would seem to come fully within the meaning of the Statute; for a parol agreement for a lease of more than three years would appear to be as much within the Statute, even where there has been a substantial part performance of the agreement, as where there has not. As to taking possession the statute appears clearly to have contemplated and provided for such a case. It says, that a lessee by parol for more than three years, shall only be considered as a *tenant at will*: Now, a tenant at will, must be a TENANT IN POSSESSION; the case therefore of a lessee for more than three years under a parol agreement taking possession, seems to come directly *within the act*, and not to be taken out of it; and, as to the expenditure of money, though in pursuance of a stipulation to do so, still a parol agreement, in this case as well as in the other, would seem to be fully within the act; for the Statute says, that a lessee under a parol agreement for more than three years shall only be a tenant at will, NOTWITHSTANDING ANY CONSIDERATION HE MAY HAVE PAID. If this view of the Statute be a correct one, as it is conceived it is, how it could ever have been decided, that the circumstance of a lessee taking possession under a parol agreement, or expending money in improvements, even in pursuance of an agreement to do so, could take the case out of the Statute, is not very easy to say. Perhaps it may not be advancing too broad a position, to say, that every case of a parol agreement for a lease for more than three years, comes fully within the Statute ‡.

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* In *Gunter v. Halsey*, Amb. 586, it was said, that the act done in part performance must be such as could not be done with any other view or design than to perform the agreement.

† From what has just been observed, it may, perhaps, be hardly necessary to state, that such acts as preparing a lease, or making a survey or valuation, though they may have been attended with expense to the party seeking a specific performance of a parol agreement, are nevertheless not such acts as constitute a substantial part performance, and consequently they will not take a parol agreement out of the statute. See *Pym v. Blackburne*, 3 Ves. 38 (in note); and see *Clarke v. Wright*, 1 Atk. 12. *Wile v. White*, cited 1 Bro. C. C. 409. In the case of *Bowers v. Cator*, 4 Ves. 91, it was contended, that concurring in appraising fixtures was a substantial part performance; but how the case was determined does not appear from the report. It is conceived, however, that such a circumstance scarcely constituted no substantial part performance.

‡ The above reasoning (as will appear from what has been already said) is founded on the assumption, that a parol agreement for a lease of more than three years, as well as a parol lease itself, comes within the first section of the statute, which says, that *all terms of years* created by parol only, shall not, either in law or equity, be considered as more than estates at will, except leases not exceeding three years, &c. These words, it is conceived, will clearly comprise parol agreements for leases, as well as parol leases themselves; for an agreement for a lease for years clearly creates an equitable term of years, or, in other words, a term of years in equity; and consequently, a parol agreement for a lease exceeding three years, must necessarily be within the first section.

The Editor is aware that it might be contended, that where the statute says, “that terms of years created by parol shall not in equity be considered as more than estates at will,” that the meaning is, that an actual demise, if by parol, shall not be considered as good in equity any more than at law. But if the words will bear a larger construction, why not put it upon them, when doing so would only be agreeable to the evident spirit and intention of the act? If this extended construction of the first section is warranted by the general spirit and object of the act, then such part of the fourth section as relates

good lease for twenty years. 'So if A. licence B. to en-'] 5 H. 7. 1
joy such a piece of land for twenty years; this is a good lease Agreed by all
the Judges,

As to paying a consideration, making improvements, &c., wherever a lessor is found so dishonourable as not to perform his parol agreement, some means should be hit upon to guard the lessee against loss, without violating the Statute. Why should not an action at law lie in such a case for money had and received, or laid out and expended by the lessee to the use of the lessor? See *Hollis v. Edwards*, 1 Vern. 160. Or might not a court of equity decree the money to be repaid (see *Forster v. Hall*, 3 Ves. 712), and hold that the lessee should, as against the lessor and those claiming under him, as volunteers or with notice, have a lien upon the property agreed to be leased till it was repaid?—as the lessee advanced his money on the faith of having an interest in the property (a lease of it), perhaps this might be properly enough done. If a lessee, or any other person, who neglects to comply with the Statute, can be guarded from actual loss, it is as much, it is conceived, as he can reasonably expect. But notwithstanding these observations, the Student will keep in recollection that a substantial part performance of a parol agreement is held to take the case out of the Statute: and it may be proper to observe, that wherever there has been a substantial part performance, it is not, it is conceived, merely the party who does the act constituting such part performance, who can avail himself of it, but the other party, it is presumed, may also avail himself of it. Thus, if the part performance consists of the lessee taking possession, or laying out money in improvements, such circumstances, it is conceived, will have the same weight in a bill for specific performance brought by the lessor, as they would have had in the bill brought by the lessee.

But even where there has been a substantial part performance of a parol agreement, yet if the agreement is positively denied by the defendant's answer, and is only proved by one witness, a specific performance, generally speaking, cannot be obtained. See *Lindsay v. Lynch*, 2 Sch. & Lef. 1. *Pember v. Mather*, 1 Bro. C. C. 53. If, indeed, the evidence of such witness is corroborated by circumstances,

relates to lands, (even supposing it to extend to contracts for leases) should not be considered as lessening or abridging the effect of the first section; but that the first section should have the same operation and effect as it would have had in case the act had not contained the fourth section; in which case that part of the fourth section which relates to lands, might be considered as introduced for the sake of abundant caution.

Looking at the first and fourth sections in this way, (though the Editor cannot help thinking that the view he before took of the fourth section is a sound one) all inconsistency between them will be avoided; but if we consider the first section to be confined to estates or interests in lands actually transferred at law, and the fourth section as alone relating to contracts or agreements in equity, then, as to leases for three years or less, an evident absurdity is the result; for the first section allows an actual lease (or a demise at law) to be made by parol, provided it does not exceed three years; whereas the fourth section would require an agreement, for such lease to be in writing; thus requiring more solemnity to create an equitable interest than to create a legal one, which it is hardly possible to suppose is agreeable to the real intention of the act. So too, if we consider the first section as confined to estates or interests actually transferred at law, and the latter only as applying to contracts or agreements in equity, a further inconsistency presents itself: viz. that to create an interest at law exceeding three years, if such interest is created through the medium of an agent, the agent must have an authority in writing, whereas, to create a like interest in equity (which may, of course, be turned into a legal one) the agent's authority need not be in writing, though there seems to be as much reason why it should be so in this case as in the other. All inconsistency, however, would be avoided by considering the first section as applying equally to contracts or agreements in equity, as to interests actually transferred at law, and by considering that part of the fourth section which relates to lands as inserted for the sake of abundant caution, and as not lessening or controlling the operation of the first section. If this should be a sound view of the two sections, it necessarily follows that an agent must always have a written authority, where the contract or agreement relates to an interest in lands exceeding three years.

Supposing, however, that the first section only applies to estates or interests in lands intended to be actually transferred at law, and not to mere agreements operating in equity, and that it is only the fourth section of the act which relates to the latter,—even supposing this to be the case, still the words of this section, (and certainly the general spirit and intention of the act) appear to reach such cases as have been considered not to be affected by the act. The fourth section says, that no action shall be brought whereby to charge any person upon any contract or (for) sale of lands, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some person lawfully authorized by him. This section, therefore, in effect, distinctly says, "that no action shall be brought upon any parol contract relating to lands;" therefore, to hold that actions (or suits in equity) may be brought on parol agreements on the ground of part performance, does not seem very easily reconcilable with the letter of the fourth section, any more than with the letter of the first; and is evidently irreconcilable with the general spirit of the act, the object of which clearly was to put an end to parol agreements relating to lands, except in the case of leases not exceeding three years.

Mic. 20 Jac. lease for twenty years. And therefore it is the common course, if a man make a feoffment in fee, or other Bridgman.
And 8 Car. B.R. estate,

circumstances, then the agreement will be enforced, notwithstanding the denial by the answer. See *Poole v. Medlicott*, 1 Ball & Be. 401; and see *Allen v. Bower*, 3 Bro. C. C. 149. *Morphett v. Jones*, 1 Wils. Ch. Rep. 100.

Where there has been no substantial part performance of a parol agreement, it will not be enforced against a defendant who pleads the statute, notwithstanding he should admit the agreement. *Blagden v. Bradbear*, 12 Ves. 466, and *Kins v. Balf*, 2 Ball & Be. 349. But if the agreement is admitted by the answer, and the Statute not pleaded and insisted upon, a specific performance will be enforced, even though it is not proved by a single witness, and although there has been no part performance. See *Croyston v. Baines*, Pre. in Ch. 208; and see *Mortimer v. Orchard*, 2 Ves. jun. 243.

With reference to the subject of enforcing parol agreements for leases, it may be observed, that where a parol agreement is fraudulently prevented from being put into writing, that in such a case the agreement, notwithstanding it rests on parol, and although there has been no part performance, will be enforced. See *Maxwell v. Montacute*, 1 Eq. Ca. Ab. 19. *Leake v. Morrice*, 2 Ch. Ca. 135. *Hollis v. Whiting*, 1 Vern. 151. It is conceived, however, that it must be proved either by two witnesses if denied by the defendant's answer, or by one witness accompanied by circumstances corroborating his evidence.

The subject of enforcing a specific performance of agreements for leases under powers, has already been briefly noticed: see supra, page 270. The case of *Blore v. Sutton*, 3 Meriv. 237, is an important one upon the subject. In this case it was held, that a parol agreement for a lease by a tenant for life, with a power of leasing, could not be enforced against the remainder-man, notwithstanding there had been a substantial part performance on the part of the lessee, and notwithstanding the lessee had had out considerable sums in pursuance of the agreement even after the remainder-man came into possession of the estate. The Master of the Rolls, however, did not consider this latter circumstance as any ground on which to compel the remainder-man to perform the agreement, unless it was shewn that he permitted the expenditure, knowing that the lessee had only a parol agreement from the tenant for life. [This would have amounted to fraud on the part of the remainder-man, and would have made the case similar to that of *Stiles v. Cowper*, supra.]

With respect to the period within which application must be made for a specific performance; if the lessee is in possession under the agreement, laches, in such a case, cannot, it is presumed, be imputed to either party; and consequently a court of equity, it is apprehended, will entertain an application for a specific performance at any time before the expiration of the term for which the lease was to be granted. If, indeed, an agreement is entered into for a lease for lives, not naming them, and the lessee is let into possession, in this case unless the lessee makes application for a lease within a reasonable time after the agreement, equity will render him no assistance in obtaining it, for if he could obtain it after hanging back a long time, he most probably would be obtaining a much more

* The agreement was entered into between the lessee and an authorised agent of the lessor (the tenant for life). It was entered by the agent's clerk in a book, and signed by the clerk. The Master of the Rolls, however, did not consider this a sufficient signing within the Statute of Frauds to bind the principal; the agreement was therefore to be considered at most as a mere parol agreement. Had it been signed by the agent himself, no doubt appears to have been entertained but it would have bound the principal (the tenant for life), and, it is conceived, the remainder-man also. See supra, page 270. [In what cases principals are bound by the acts of their agents, and in what cases they are not, is a point, for information upon which the Editor begs to refer to Mr. Sugden's Vendors and Purchasers.]

It may be proper to observe, that it has been held in several cases (see *Clinan v. Cooke*, 1 Sch. & Lef. 31, 32. *Mortlock v. Buller*, 10 Ves. 311; and see Sug. Vend. & Pur. 5th edit. 88.) that the authority given to an agent to enter into a contract relating to lands, need not be in writing, a written authority not being required by the fourth section of the Statute of Frauds. If, therefore, this section applies to contracts or agreements for leases (though *quære* of its doing so, and see supra) an agent who enters into an agreement for a lease need not have an authority in writing.

† It may not be improper to notice, that in the above case of *Blore v. Sutton*, the Master of the Rolls held, and it is conceived properly, that the lessee had no right to call upon the representatives of the tenant of life to reimburse him the money he had expended; for the tenant for life had never refused to grant a lease pursuant to the agreement, therefore it could not be a case for damages to be paid out of the assets of the tenant for life; neither, in fact, had the lessee at that time sustained any damage, as he had not been evicted: and as to the remainder-man, (whose estate had been benefitted by the expenditure of the lessee), as to his being liable to make the lessee a compensation in case he evicted him, the Master of the Rolls seemed to consider it doubtful, whether a court of equity had any jurisdiction to award a compensation in such a case. In the case of *Pilling v. Armitage*, 12 Ves. 78, it was held, that a lessee laying out money under the observation of his lessor, but not under any specific agreement for the purpose, and without receiving any particular encouragement from his lessor, was a case which did not afford any ground of equitable relief.

estate, upon condition, that if such a thing be, or be not done at such a time, that the feoffor, &c. shall re-enter, to

more beneficial one (by being on younger lives) than if he had obtained it within a reasonable time after the agreement was entered into. See *Lord Kensington v. Phillips*, 5 Dow P. C. 61; and see *O'Herlihy v. Hedges*, 1 Sch. & Lef. 128.

In applications to the Court of Chancery for a specific performance of agreements for leases, it sometimes happens that the term expires before the hearing of the cause. Where this happens to be the case, the Court, it is conceived, would still direct a lease to be granted, and to be ante-dated, provided there had been any material breach of any covenant which ought to have been inserted in the lease; so that by granting of the lease the party injured by the breach might bring his action at law. See *Nesbit v. Meyer*, 1 Wils. C. C. 97: And where there had been any material breach of any such covenant, a court of equity would probably direct a lease to be granted, even though the term was actually expired at the time of filing the bill, or, at least, if it had not been long expired. The case of *Weston v. Sim*, cited in *Nesbit v. Meyer*, supra, may be thought to militate against this opinion, but it seems to be countenanced by the opinion of the Master of the Rolls, in *Nesbit v. Meyer*, notwithstanding an old authority or two to the contrary. It may be observed, that an agreement for a lease will be enforced in equity, notwithstanding there may be a bond with a penalty for the non-performance. *Oates v. Chapman*, 1 Ves. 542, and *Howard v. Hopkins*, 3 Atk. 371. It may also be observed, that either party has a remedy at law on the agreement by an action for damages for breach of the agreement.

If a husband possessed of a term of years in right of his wife, enters into an agreement for an underlease, but dies before granting it, leaving his wife surviving, she will be compelled to carry the agreement into execution; which appears to be but reasonable; for as an actual lease granted by her husband would have bound her both at law and in equity, so his agreement for a lease should bind her in equity. See *Stead v. Cragh*, 9 Mod. 42; and also *Druce v. Dennison*, 6 Ves. 394.

Agreements are sometimes entered into for granting leases for seven, fourteen, or twenty-one years, or for other like periods. An agreement of this kind must be carried into execution by granting the lease for twenty-one years, with a power for the lessee to determine it at the end of seven or fourteen years, giving six months notice. And the power to determine (unless the agreement expressly says the lessor shall have it as well as the lessee) is to be given to the lessee only. See *Price v. Dyer*, 17 Ves. 363.

Agreements for leases frequently stipulate that the leases shall contain all usual or all reasonable covenants, clauses, &c. on the part of the lessor and lessee. The question has often arisen upon an agreement so penned, whether the lease should contain a covenant or proviso to restrain the lessee from assigning or underletting without the lessor's consent, and after several conflicting decisions on the point, it may now be considered as settled, that the lessor has no right to the insertion of such a covenant or proviso. See *Henderson v. Hay*, 3 Bro. C. C. 632. *Jones v. Jones*, 12 Ves. 186. *Ferr v. Loveden*, ib. 179. *Broune v. Bladen*, 15 Ves. 528. *Church v. Browne*, ib. 258. In the case of *Falkingham v. Croft*, 15 Ves. 267, it was contended on behalf of the lessor of a public-house, that with respect to the insertion of a covenant or proviso not to assign or underlet, a distinction might be made between a public-house and other kinds of property; but Lord Eldon was of opinion, that the different nature of the property was no reason for a different rule prevailing than what prevailed in other cases, and determined accordingly. But if an agreement for a lease should provide that the lease should contain all such covenants, &c. as were usually inserted in leases of lands (or houses) in the neighbourhood, if a covenant or proviso in restraint of underletting and assigning was found to be a usual one in leases of lands, &c. in the neighbourhood, in that case, it is conceived, the lease must contain a covenant or proviso against underletting and assigning. See *Boardman v. Mostyn*, 6 Ves. 467. [The Court in such a case would direct, the Master to ascertain whether such a covenant or proviso was usually inserted in leases of lands (or houses) in the neighbourhood.]

Under an agreement that the lease shall contain all usual or proper covenants, it must contain such as are usual with reference to the nature of the property; and under the term "usual" not what is usual in leases of property in the neighbourhood is to be understood, but what is usual in leases in general of lands, or houses, or mines, or whatever the property agreed to be demised may happen to be. See *Burwell v. Harrison*, Pre. Ch. 25. And the expression "usual covenants" may be considered as the same with the expression "reasonable covenants," or "proper covenants." But if, instead of saying that the lease should contain all proper, or usual, or reasonable covenants, the expression should be that the lease should contain "such covenants as were usually contained in leases of lands, &c. in the neighbourhood," this, as we have already seen, would alter the case. See *Boardman v. Mostyn*, 6 Ves. 467. If an agreement for a lease is altogether silent about the covenants, &c. to be inserted in the lease, still it is conceived the lease must contain all usual covenants, &c. both on the part of the lessee and lessor. See *Church v. Browne*, 15 Ves. 265. The Editor finds no express decision upon this point, but it is presumed there can hardly be a doubt upon it:—there is as much reason why a lease should contain all usual covenants, notwithstanding the agreement is silent on the subject, as that a conveyance to a purchaser shall contain the usual covenants although the contract says nothing about it; and in the latter case it is well known that the deed must contain all proper covenants. In agreements, however, for leases, it would always be best to specify what covenants the lease should contain, and especially where the lease is to repair, it should be stated whether the

covenant

to the end that in this case the feoffor, &c. may have the land and continue in possession until that time, to make a covenant

covenant should contain an exception of destruction or damage by fire. See *supra*, p. 173, note (A). Whether a lease must contain a power of re-entry for non-payment of rent and non-performance of covenants*, where the agreement is silent upon the subject, is also a point upon which the Editor finds no information: it can hardly be doubted, however, but it must; for not only is such a proviso usual in leases (and whatever covenants or provisos are usual must be inserted, it is conceived, whether there may be any agreement to that effect or not), but such a proviso is of most essential importance to the lessor—without it the lessee's covenants might, in many instances, be of little use.

Having noticed pretty fully the subject of agreements for leases, and where a specific performance will be enforced, and having touched upon the subject of the covenants, &c. which must be inserted in leases made in pursuance of agreements, it may be proper to notice, that in certain cases, agreements for leases (even though they may be written ones, and in all respects comply with the Statute of Frauds) will not be enforced. Fraud and mistake, as we have already seen, are grounds on which a court of equity will refuse to enforce a specific performance of an agreement. Nor will equity, at the instance of the lessee, enforce a specific performance of an agreement for a lease, where, if an actual lease had been granted, the lessor would have had a present right of re-entry for breach of covenant, &c., unless there has been a waiver of the forfeiture; in which case a specific performance will be enforced. See *Gourlay v. The Duke of Somerset*, 1 Ves. & Be. 72. Where a tenant has grossly mismanaged his farm (even though such mismanagement would not have amounted to a forfeiture had there been an actual lease), this will be a ground for equity refusing him its assistance. *Boardman v. Mostyn*, 6 Ves. 467; and see *Hill v. Barclay*, 18 Ves. 631. So, if a lessee has given notice to quit pursuant to a power for that purpose contained in the agreement, equity will afterwards render him no assistance in obtaining a specific performance. *Western v. Perrin*, 3 Ves. & Be. 197. In the case of *Weatherall v. Gearing*, 12 Ves. 504, a lessee, under an agreement, made an assignment contrary to his agreement, and the Court refused a specific performance in favour of the assignee ‡. In the case just noticed, the Court intimated an opinion, that even an assignee by operation of law (as the assignee of a bankrupt, or under the Insolvent Debtors' Act) would not have been entitled to a specific performance, and seemed to think it was doubtful whether such an assignee would be entitled to a specific performance, even though the lessee was not restrained from assigning. In the case of *Flood v. Finlay*, 2 Ball & Be. 9, Lord *Manners* refused to enforce an agreement for a lease, at the instance of the assignees of the lessee, who had become a bankrupt, because it appeared that the lease was intended for the personal benefit of the lessee. [In this case the lessee was restrained by the agreement from assigning, which, according to the opinion expressed in the case of *Weatherall v. Gearing*, was another ground on which a performance of the agreement in favour of the assignees might have been refused; but Lord *Manners* did not notice this ground.] But though a specific performance will not be enforced in favour of an assignee by contract (nor probably of an assignee by operation of law) where the lessee is restrained from assigning; yet in the case of *Williams v. Cheney*, 3 Ves. 59, the Court decreed a specific performance at the instance of the lessee himself, notwithstanding he had entered into an agreement to underlet, contrary to his agreement with the lessor. In this case, however, the agreement to underlet was not an actual under-letting, and as an actual under-letting was the thing prohibited, the decision, it is conceived, was a proper one. If an agreement to assign or underlet will not deprive the lessee of the assistance of equity to obtain a specific performance, much less will advertising to let his farm be a ground on which to deny him its assistance. *Gourlay v. The Duke of Somerset*, 1 Ves. & Be. 68. Where a lessee had refused to execute a lease, expressing himself satisfied with the agreement, which he considered sufficient without a lease; this was held to be no reason for afterwards refusing a specific performance at his instance. See *Gourlay v. The Duke of Somerset*, 1 Ves. & Be. 73.

If a lessee, after entering into an agreement for a lease, commits a felony, equity will not enforce the agreement. *Willingham v. Joyce*, 5 Ves. 168. And perhaps an act of bankruptcy, even though no commission had issued, might be a ground for equity refusing its assistance. See *Franklyn v. Lord Brownlow*, 14 Ves. 550. *Buckland v. Hall*, 8 Ves. 92. In the case, however, of *De Minckwitz v. Udney*, 16 Ves.

* A lessor may stipulate for a right of re-entry on any event he pleases; but a power of re-entry is usually confined to non-payment of rent and non-performance of covenants. It is, however, sometimes extended to the case of the lessee becoming a bankrupt, making an assignment for the benefit of his creditors, suffering the lease to be taken in execution, or taking the benefit of the Insolvent Debtors' Act.

† *Quare*, whether this ought to be a ground for refusing a specific performance? How is the Court to draw the line between that degree of mismanagement which should deprive the lessee of his right to a specific performance, and that degree of mismanagement which should not deprive him of it? It would seem that a specific performance should be only refused where the lessee would have a right of re-entry in case an actual lease had been granted. In all other cases, it is conceived, there should be a specific performance, and the parties afterwards left to their legal rights and remedies.

‡ If the lessor accepted the assignee as tenant, would not the assignee in that case be entitled to a specific performance?—it is conceived he would.

a covenant that he shall hold and take the profits of the land until that time; and this covenant in this case will make

16 (17) Ves. 466, the Court enforced an agreement for a lease at the instance of *the lessee*, notwithstanding he had taken the benefit of the Insolvent Debtors' Act; but the decision appears to have rested upon the circumstance of the bill having been filed before he took the benefit of the act; and the Lord Chancellor observed, that the consequence was, that the assignee under the act must come in by a supplemental bill. [*Quære*, whether the assignee would be entitled in such a case to a specific performance? See *Weatherull v. Gearing*, 19 Ves. 504.] Where not restrained from doing so, a lessee, it is conceived, may assign the benefit of his agreement; and a court of equity, it is presumed, will, generally speaking, enforce a specific performance of it in favour and at the instance of the assignee. Courts of equity, however, exercise a discretion in giving or refusing their assistance in such cases: therefore, if the assignee was insolvent, or in any other respect an evidently improper person, equity would render him no assistance. *O'Hertilly v. Hedges*, 1 Sch. & Lef. 130; and see *Buckland v. Hall*, 8 Ves. 95. Though *quære*, whether equity should in any case refuse its assistance where the lessee might have assigned had he had an actual lease? See note (†) at the bottom of last page.

In considering the subject of agreements for leases, it may be proper to notice the question—whether a lessee, who has entered into an agreement for a lease, can compel the lessor to shew his title. The information afforded by the cases upon this point is but scanty. The case of *White v. Foljambe*, 11 Ves. 337, is the first, it is believed, in which the point was considered; but the circumstances of the case did not require that it should be decided. In the cases of *Gwillim v. Stone*, 3 Taunt. 433, and *Temple v. Browne*, 6 Taunt. 60, it was held, that an agreement to grant a lease did not contain an implied engagement to deliver an abstract of the lessor's title; but these were cases at law, and probably cannot be considered to have much influence upon the question. In the case of *Fildes v. Hooker*, 2 Meriv. 424, the Master of the Rolls observed, that he should hesitate before he decided that the owner of real property, by contracting to grant a lease, became bound to shew his title. But his Honour seemed to be of opinion, that a lessee should not be compelled to a specific performance, without the lessor shewed his title;—that is, in case the lessee required to see it. In the present state of the question, it may be observed, that in the case of a lessee at rack-rent, (where he is under no stipulation to expend money) it might perhaps be proper to compel the lessor to shew his title, (if the lessee required it) *only* where he (the lessor) was seeking to enforce a specific performance; and if he declined doing so, the Court should render him no assistance. In cases, however, where the lessee was to pay a fine, or was under an engagement to expend money, there, perhaps, the lessor should be compelled to shew his title, without regarding whether he himself or the lessee was the party seeking a specific performance. And yet this might lead to cases of hardship upon lessors; for it possibly might happen that the expense of shewing the lessor's title might amount to more than the fine, or the sum to be expended. The same hardship, however, might arise in the case of small purchases, and yet however small a purchase may be, the purchaser, unless precluded by agreement, has a clear right to an abstract of the vendor's title. The hardship which might arise in particular cases to lessors, can be no reason for laying down a rule which might produce much greater hardship to lessees. With a view, as far as possible, to the benefit of lessees, and at the same time to avoid as much as possible cases of hardship to lessors, perhaps no better rule could be laid down, than to hold that a lessee was entitled to see his lessor's title, where he had paid, or had stipulated to pay a fine, or had laid out or had agreed to lay out money in improvements; and also in all cases where the lessor was seeking a specific performance, even though the lessee had not paid, or had not agreed to pay any fine, or was under no agreement to expend money. The line, it is conceived, could only either be drawn as above mentioned, or the broad rule should be laid down that a lessor should in no case be bound to shew his title, unless he had either agreed to do so, or was seeking a specific performance*. Where a lease is granted under a power, the lessee, it is conceived, has, in every case, a right to see the deed or will containing the power, in order to satisfy himself that the lease is executed agreeably to the power.

As intimately connected with the subject of agreements for leases, the subject of covenants in original leases for granting further or future leases, may here be noticed. Such covenants (which are commonly called "covenants for renewal") are sometimes confined to a single renewal, sometimes to two or three, and sometimes they extend to perpetual renewals—the last are common in Irish leases. Generally speaking, a specific performance of such covenants will be enforced against the covenantor and all claiming under him, either as volunteers or purchasers with notice. So, unless in cases where the benefit of such a covenant is evidently meant for the lessee *personally*, all claiming under him will be entitled to the benefit of it, and may enforce a performance of it. In the case of *Hyde v. Skinner*, 2 P. Wms. 196, the covenant was to renew at the request of the lessee, not meaning his executors or administrators: The lessee died without making a request, and there being nothing to shew that the renewal

* In the case of *Fane v. Spencer*, 2 Meriv. 430, it was held, (though on a ground, perhaps, not very intelligible,) that the vendor of a bishop's lease was not bound to shew his lessor's title. According to this decision, a bishop who has contracted to grant a lease (and it would be the same, it is conceived, in the case of every other ecclesiastical corporation), would not be bound, it is presumed in any case to shew his title.

make a good lease for that time, if the uncertainty of the time (whereunto care must be had) do not make it void.
And

renewal was to be for the benefit of the lessee personally, the performance of the covenant was enforced in favour and upon the request of the lessee's executors. In the case, however, of *Duke v. The Mayor of Exeter*, (cited 2 Vern. 97; and see *Lawles v. Powell*, Moore, 273) it was held, that the assignee of a bankrupt, who possessed a lease with a covenant for renewal, was not entitled to the benefit of the covenant. But *quære* of this; though see the case of *Gearing v. Weatherall*, noticed above in this note*. It is true, no great favour is shewn to covenants for renewal; yet still the leaning against them cannot, it is conceived, be properly carried so far as in every case to refuse to renew in favour of the lessee's assignee by operation of law. In adverting to the leaning which the Courts have against these covenants, it will be proper to notice, that if the performance of a covenant for renewal is to be preceded by the doing of something on the part of the lessee—(as making a request or application for renewal, paying a fine, &c.) the lessee must take care to do what is required on his part, otherwise, generally speaking, courts of equity will render him no assistance in enforcing a performance of the covenant.

With respect to enforcing a specific performance of covenants for renewal, it may be proper to distinguish between such as relate to leases for *lives*, and such as concern leases for *years*; and in leases for *lives* a further distinction may perhaps be made; viz. between those in which a fine is payable on renewal, and those in which none is payable.

In the case of a lease for *lives* a covenant was contained on the part of the lessor, to renew at the request of the lessee within a certain period after the death of *each* of the *cestuis qui vie*, and upon paying a fine. The lessee neglected to apply for a new lease upon the death of the life which first dropped, and waited till a second dropped before he applied; and upon the question arising whether he was entitled to a renewal it was held that he was not. See *Baynham v. Guy's Hospital*, 3 Ves. 295. There was a circumstance, indeed, in this case which, it is presumed, but seldom occurs in the case of covenants for renewal: viz. the lease contained a proviso, that if the lessee should neglect to apply for a renewal, and to pay his fine within the prescribed period *the lease should be void*. The Court, however, does not appear to have been much influenced by this proviso, but to have decided against the lessee's right to renewal, on the ground of gross laches in not applying for it. Wherever, indeed, the covenant is to renew at the request of the lessee within a given period after the death of *each* of the *cestuis que vie*, if the lessee delays to apply within the prescribed time after the dropping of the first life, but waits till a second drops, equity will give him no assistance in obtaining a renewal. See *Bailey v. The Corporation of Leominster*, 3 Bro. C. C. 529, and *Eaton v. Lyon*, 3 Ves. 690. And if the covenant is to grant a new lease (upon request, within a given period after the death of *any* of three *cestuis qui vie*) "for one or more life or lives, in the room of the life or lives so dying," in a case like this, though it may not be necessary to apply for a new lease upon the death of the life first dropping (though it would be the safest to do so), yet if no application for a renewal is made within the prescribed period after the dropping of the second life, but the lessee waits till the last of the three lives drops, equity will render him no assistance. See *Eaton v. Lyon*, 3 Ves. 690 t.

In all the cases above noticed, there were gross laches on the part of the lessee in applying for a renewal, and consequently they do not go the full length of establishing the doctrine—that to entitle the lessee to the assistance of a court of equity, he must apply for a renewal *strictly within the prescribed period*. The application, however, must, it is conceived, be made, generally speaking, *strictly* within the appointed time, otherwise the lessee will not be entitled to the aid of a court of equity, unless in the case of fraud by the lessor, or of accident, mistake, &c. on the part of the lessee, and where compensation can be made. In cases in which compensation cannot be made, the propriety of refusing to enforce a renewal, where not duly applied for cannot be questioned. Thus in the case of a lease for *lives* renewable a certain number of times (and not for ever), if the lessee could compel the lessor to renew after the prescribed period, he possibly might obtain quite another interest than what he would have obtained had the application been made within the appointed time; for the new life might be quite a different one to the one which might have been inserted in the new lease in case it had been applied for within the prescribed period, and consequently the property might possibly be prevented from returning to the lessor so soon as it otherwise would have done; and as it would be impossible to ascertain in such a case what injury the lessor might sustain, it could not be a case for compensation.

* In the above case the term for which the new lease was to be granted was not mentioned in the covenant for renewal, and the executors applied for a new lease for fifty years (the original term was only five years); but the Court held, that the request for a new lease of fifty years was unreasonable, and decreed one to be granted for twenty-one years, that being the usual period of leasing. *Quære*, as no period was mentioned for which the new lease was to be granted, was not the covenant for renewal such as could not be specifically enforced, unless it could have been inferred, that the new lease was to be granted for the same term for which the old one was granted? See *supra*, on the subject of agreements for leases where no term is specified.

† In this case application for a renewal was made within the appointed time after the death of the second life that dropped, but the application was not followed up, and therefore the case appears to have been treated as if no application had been made; though *quære* whether properly so?

And therefore if A. bargain and sell his land to B. on condition to re-enter if he pay him an hundred pounds, and

compensation. And even if the covenant was for perpetual renewal, and where it might be urged, that such reasoning as the above could not very forcibly apply; yet even in that case, if fines are payable upon renewal, and the lessee does not apply for a renewal strictly within the prescribed period, the lessor might not be receiving his fines so frequently as by the terms of the covenant for renewal he ought to receive them; and the case does not appear to be a case for compensation; for how could a compensation be computed where there are no data upon which to make the computation? Had the lease been renewed at the proper time, the life then put in, and even others in subsequent renewals, might have all dropped; so that it being impossible to say what fines the lessor might have received in case the renewals had been duly made, it must be equally impossible to say what would be a compensation to the lessor on account of the lease not being renewed within the prescribed time. In cases, therefore, of leases for lives renewable upon request (whether renewable for ever or not), if a fine is payable, it may be laid down, it is conceived, as a general rule, that unless the request is made strictly within the prescribed period, courts of equity will render the lessee no assistance, except where there has been fraud on the part of the lessor.

In the case of a covenant for perpetual renewal WITHOUT fine, it may be said that no possible injury could be sustained by the lessor from the lease not being renewed at the appointed time, and consequently that courts of equity should enforce a renewal, notwithstanding the lessee should have neglected to apply within the prescribed period. On the other hand, however, it might be observed, that requiring the previous application of the lessee might be intended for the express purpose of affording the lessor a chance of the estate reverting to him, by the lessee neglecting to make the request; and, considering the present leaning of the Courts against covenants for renewal, especially for perpetual renewal, there may be reason to think, that no favour would be shown to the lessee where he neglected to apply within the prescribed period, even where it was the case of a covenant for perpetual renewal and without fine. In the case of *Ratou v. Lyon*, the Masters of the Rolls observed, "I hope it will now be known, that these covenants," (covenants for renewal) "will be literally performed where it can be done, and that equity will interpose only where a literal performance has been prevented by the means I have mentioned," (viz. fraud, unavoidable accident, or ignorance, not willing) "and where no injury is done to the lessor."

We may here enquire whether the same strictness is necessary in applying for renewals of leases for years, as in the case of leases for lives. In the case of *Rawstorne v. Bailey*, 4 Bro. C. C. 415, a lease was granted for twenty-one years of copyhold lands, (which by the custom of the manor might be granted for that period, but not longer, without licence). The lease contained a covenant on the part of the lessor, upon the request of the lessee, at any time before the end of the term, to renew for a further period of twenty-one years, or in like manner for other further terms, so as to make together a term of 99 years. A yearly rent of only 1*l.* was reserved, and the lessee laid out a large sum in building upon the premises. He neglected to apply for a new lease within the prescribed time, but applied for it about three years after; and it was determined that he was entitled to a new lease, notwithstanding such neglect. But this case, perhaps, cannot in strictness be considered as bearing upon the point under consideration; for the lease was in reality intended to be a lease for ninety-nine years; and, as was observed by the Master of the Rolls, the only reason why it was not granted for that term was, because the custom of the manor did not allow it. In the case, however, of *Allen v. Hilton*, Fonbl. Tr. on Eq. 432, the point under consideration appears to have come before the Court. In this case the lessor covenanted to renew at the request of the lessee within three months before the expiration of the old lease. The lessee neglected to apply for a renewal within the time prescribed; and it was held, that he had lost his right of renewal; the Lord Chancellor observing, "that if a lessee could have relief in such a case, he knew not where the Court would stop: it would be holding, that the lessee should be loose, and the lessor bound." It does not appear, that any fine or additional rent was to be paid in this case upon granting the new lease, and consequently the delay on the part of the lessee in applying for a new one could not work any injury to the lessor (though even if a fine or increased rent had been payable, the case was one in which compensation might have been made); nor does it appear that there were any gross laches on the part of the lessee, so that the case must be considered as laying down the broad doctrine, that a lessee for years (unless excused by fraud, &c.) must apply for a renewal strictly within the prescribed period, otherwise he will be entitled to no assistance from a court of equity. And the same doctrine was advanced by Lord Eldon in the case of *The City of London v. Milford*, 14 Ves. 58, (which was the case of a lease for years), where his Lordship observed, "where there has been a default in making a request, unless excused by circumstances, there is no authority for decreeing a specific performance." And see *Rubery v. Jervis*,

* In *Fonblanque's Treatise on Equity* it is said, that the decision in the case of *Allen v. Hilton*, might be influenced by the nature of the property, which was a colliery, and that from a note which the editor (Mr. Fonblanque) had of the case, the Lord Chancellor appeared to have adverted to such circumstance; "but his Lordship" Mr. Fonblanque observes, "seems to have rested his decision upon general principles, and not upon the particular circumstances of the case." Therefore the case may be considered as laying down the doctrine in support of which it is cited.

and *B.* doth covenant with *A.* that he will not take the profits until default of payment, or that *A.* shall take the profits.

v. Jervoise, Durnf. & East's T. R. 229*. And whether the covenant is for perpetual renewal, or only for a certain number of renewals, and whether a fine is payable or not, will, it is conceived, make no difference. In short, in every case the application must be made, it is presumed, within the time prescribed, or equity will render no assistance, except where the delay in making the application was occasioned by fraud on the part of the lessor, or "unavoidable accident, or ignorance, not willing," on the part of the lessee. *Eaton v. Ligon*, 3 Ves. 693. But even where the delay has been occasioned by accident or ignorance on the part of the lessee, still, it is conceived, a court of equity could give him no relief, unless it could be done "without injury to the lessor." See *Eaton v. Ligon*, 3 Ves. 690. [Where no injury is done to the lessor by the delay, infancy, coverture, insanity, or other legal disability, would, it is conceived, be grounds on which the delay would be excused, and a specific performance enforced notwithstanding the delay.]

It is proper to observe, that there may be other grounds, besides that of delay on the part of the lessee in requesting a renewal, on which courts of equity may refuse to enforce a renewal. Thus, in the case of *The City of London v. Mitford*, 14 Ves. 41, a lease was granted for forty years, with a covenant on the part of the lessor, within one month next before the expiration of the forty-years, at the request and expense of the lessees, to grant a new lease for a further term [of forty years, at the like rent and under the same covenants, &c. as were contained in the first lease, and so in like manner for ever; and the lessees covenanted, that if they should decline taking a new lease, they would not only leave the premises in as good repair, but would convey to the lessor, his heirs and assigns certain lands and buildings lying between the lessor's premises and the river Thames. The lessees neglected to apply for a new lease within the prescribed period, but applied for one soon afterwards, and filed a bill for a renewal; but in consequence of obtaining a new lease from one of two parties entitled to the property (she was entitled to one moiety in fee and to the other for life) the suit was not prosecuted against the other party. Upon the death, however, of the party who had granted the new lease (and which then determined as to a moiety,) application was made for a renewal to the parties who were then entitled to such moiety, and a bill filed against them in order to obtain such renewal. The Lord Chancellor, however, held the lessees were not entitled to it. What were the grounds on which his Lordship rested his decision does not very clearly appear from the report of the case; though it may perhaps be collected that he rested it upon the circumstance of the lessees having altered the nature of the property so as to have put it out of their power, had they declined renewing, to deliver up the premises according to their covenant; for they had given up part of the ground to the Committee for Building Blackfriars-bridge, and which had been laid into the street or highway leading to the bridge. His Lordship laid much stress upon the circumstance of the lessee's having put it out of their power to perform their agreement about delivering up the premises, and but little upon the circumstance of their not having applied for a renewal within the prescribed time; so that the decision, it is conceived, must be referred to the former, and not to the latter circumstance.]

IF

* In the case of *Rubery v. Jervoise*, 1 Durnf. & East's T. R. 229, a lease was granted for sixty-one years, with a covenant that at any time within one year after the expiration of the term of twenty years of the said term of sixty-one years, upon the request of the lessee, and his paying a fine to the lessors, they (the lessors) would execute another lease to the lessee for the further term of twenty years, to commence from the expiration of the term of sixty-one years, and so in like manner after the expiration of every period of twenty years, during the said term of sixty-one years, for the like consideration, and upon the like request, would execute another lease for a further term of twenty years, to commence from the expiration of the term last before granted. The lessee omitted to claim a new lease at the expiration of the first and second periods of twenty years, but he applied for one at the expiration of the third period of twenty years; but it was held, that not having applied for a renewal and paid his fine at the expiration of the first and second periods, he had lost his right to a renewal at the expiration of the third period. This case, however, it may be observed, was a case at law, and therefore may not be considered as having much weight upon the point under consideration; as courts of law construe all covenants and agreements with a degree of literal strictness which courts of equity do not. It can hardly be doubted, however, but a court of equity would have decided against the right of renewal.

† It may be proper to observe, that in leases of Irish property, containing covenants for renewal, the same serious consequence does not in all cases arise from the lessee's laches; for by an act passed in the Irish Parliament (Irish stat. 19 & 20 Geo. 3. ch. 30.), it is enacted, that in all cases of mere neglect to renew on the part of the lessee, and where no fraud appears to have been intended, and there has been no dereliction on the part of the lessee by neglecting or refusing to renew after the landlord had demanded his fine for renewal, that courts of equity shall relieve on an adequate compensation being made.—In *Ball and Beatty's Reports* there are several cases on the renewal of Irish leases.

‡ Suppose an application for a new lease had been made strictly within the period prescribed, would the alterations in that case have been a ground on which to have refused a renewal? If they would

its until default of payment; in this case, howbeit this may
be

If a covenant for renewal is fraudulently inserted by the lessee, a performance of it would, of course, be refused by a court of equity; and if, from the nature of the property or the circumstances of the case, it is clear that the lessor could not have understood the effect and operation of such a covenant, a court of equity will not enforce a specific performance of it. Thus, where a person possessed of a renewable church-lease, entered into an agreement, when upon his death-bed, to grant an under-lease, with a covenant for perpetual renewal at a certain fixed rent, and without fine; the Court was of opinion, that the lessor could not have been aware of the nature of the agreement he had entered into, because the fines to be paid to the church were likely continually to increase, and yet no fine or increased rent was to be paid on the renewal of the under-lease; and, inferring from these circumstances that the lessor could not have been aware of the nature or effect of the agreement he had entered into, it was ordered to be given up and cancelled. See *Willan v. Willan*, 16 Ves. 72.

Questions sometimes arise as to the extent of the covenant for renewal—that is, whether the covenant is a covenant for perpetual renewal or for one, two, or more renewals. The question has frequently arisen, whether a covenant to grant a further term, at the same rent and under and subject to the same covenants as in the original lease, amounts to a covenant for perpetual renewal? and it is now settled (though there are some old cases the other way: *Bettesworth v. The Dean and Chapter of St. Paul's*, 3 Bro. P. C. 389, and *Bridges v. Hitchcock*, 1 Bro. P. C. 522), that it does not, but is only a covenant for a single renewal; and consequently that the words “under and subject to the same covenants,” do not entitle the lessee to have a covenant for renewal inserted in the new lease. See *Tritton v. Foote*, 2 Bro. C. C. 636. *Russell v. Darwin*, *ibid.* 639. *Iggulden v. May*, 9 Ves. 325; and see *Baynham v. Guy's Hospital*, 3 Ves. 298, and *Dowling v. Mill*, 1 Madd. C. C. 541. In some cases of covenants to grant new leases “under and subject to the same covenants,” &c. it has been held, that the lessor having treated the covenant as a covenant for perpetual renewal (by granting repeated renewals) he should be bound by his own construction of the covenant, and consequently bound to go on renewing. See *Cooke v. Booth*, Cowp. 819, and, per Lord Hardwicke, *Furnival v. Crewe*, 3 Atk. 83, and other cases. This doctrine, however, is now exploded; and in deciding upon the operation of such a covenant, the courts now pay no attention to the construction the parties themselves may have put upon it, but construe it according to its own intrinsic meaning and import. See *Baynham v. Guy's Hospital*, 3 Ves. 298. *Iggulden v. May*, 9 Ves. 329, and 7 East's T. R. 237, and 2 New Rep. 449. *Moore v. Foley*, 6 Ves. 232.

The special penning, however, of the covenant for renewal may shew that the parties intended more than a single renewal. Thus, in the case of *Furnival v. Crewe*, 3 Atk. 83, a lease was granted for three lives, and the lessee covenanted within twelve months after the death of any of the *cestuis que vie*, to pay a fine to the lessor for adding a life to the two remaining lives, and so to continue the renewing of the lease or leases, paying such fine as aforesaid for every life so added or renewed as aforesaid from time to time; and the lessor covenanted, that, in consideration of the fine to be paid to him, or his heirs, at *Crewe Hall*, or at the place where the hall then stood, for adding one life to the remaining lives of the original *cestuis que vie*, to grant one or more lease or leases, under the same rents and covenants as was contained in the original lease, and so to continue renewing such lease or leases FROM TIME TO TIME “according to the true meaning of these presents.” The question arose, whether the covenant, according to the true meaning of the lease, was a covenant for perpetual renewal, and Lord Hardwicke decided that it was. His Lordship founded his opinion partly on the expression “continue renewing the lease or leases,” and he also noticed the circumstance of appointing the payment of the fines for renewal at *Crewe Hall*, or at the place where the hall then stood, as a circumstance shewing that a perpetual renewal must have been intended; his Lordship observing, that he did not imagine the lessor thought that *Crewe Hall* would be pulled down during the lives of the three original *cestuis que vie*.

In the case of *Moore v. Lord Foley*, 6 Ves. 232, the lessor covenanted, that when any one of three *cestuis que vie* should die, then within one year after the death of the one first dying, to grant a new lease for the lives of the survivors, and the life of a third person to be named by the lessee, and for the life of the longest liver of them, at the like rent, and under the like covenants as were contained in the original lease; and it was agreed that in such future lease it should be covenanted and agreed, that as often as any of the three persons for whose lives such new lease should be made should happen to die, then, within one year after, upon request, &c. the lessor would execute another lease, for the lives of such two of the *cestuis que vie* as should be then living, and for the life of such other person

would not, then the ground of the decision in the case of *The City of London v. Milford*, may perhaps be called in question. Had, indeed, the alterations amounted to waste, and had no act been done by the lessor which would have amounted in equity to a waiver of the forfeiture incurred by such waste, then the alterations might have been a ground for refusing a renewal, even if the renewal had been duly applied for. Without, however, meaning to give a decided opinion, that the alterations did not constitute a good ground on which to refuse a renewal, the decision, it is conceived, may be supported, on the ground, of the lessees' having neglected to apply for a renewal within the prescribed time.

be a good covenant, yet it is no good lease (o). And if the mortgagee covenant with the mortgagor that he will not take the profits of the land until the day of payment of the money; in this case albeit the time be certain, yet this is no good lease, but a covenant only. If one give a bond for the quiet holding of a close for three years; it seems this is no lease in law. See the opinion of the Parliament for *bonds and covenants* both, stat. 14 *Eliz.* c. 11 (p).

Co. 5. 1.
super Lit. 48.
Plow. 156.
197.

Co. super Lit.
45.
Co. 1. 155.

A lease for years may begin at a day to come, as at *Michaelmas* next, or three or ten years after, or after the death of the lessor or of *I. S.* and it is as good as where it doth begin presently. But a lease for life of any thing whatsoever, whether it lie in livery or in grant, if it be *in esse* before, cannot begin at a day to come. And therefore if a lease be made, *habendum* from *Michaelmas* next, or from the day of the making of it (q), or after the death of the lessor, or after the death of *I. S.* to the lessee for life; this lease is not good (r): but in case of a lease of land made thus, it is sometimes holpen by the livery of seisin. For which see *Livery of Seisin*, chap. 9. numb. 11. But all leases for years, whether they begin *in presenti*, or *in futuro*, must be certain, that is, they must have a certain beginning, and certain ending, and so the continuance of the term must be certain, otherwise they are not good. And yet if the years be certain, when the lease is to take effect in interest or possession, it is sufficient; for until that time it may depend upon an uncertainty, *viz.* upon a * possible contingent

3. In respect of the commencement, and continuance, and end of the term or estate.
Uncertainty.

* P. 273.

person as the lessee should name, at the like rent, and under the like provisoes and covenants as were therein contained; and a proviso was contained in the lease that if any two of *such* persons for whose lives such lease should be made, should die within one year, and before such new lease was made, then, within one year from the death of the second *cestui que vie*, upon payment, &c. to grant a new lease for the life of the surviving *cestui qui vie* and of such two other persons as the lessee should name, at the like rent and under the like covenants and conditions as were contained in the first term. Two of the original *cestuis que vie* having died, a question arose upon the construction of the covenants; and the Master of the Rolls held, that they did not amount to a covenant for perpetual renewal, but expressed himself of opinion, that the lessee was entitled to have a lease for the remaining life and two new ones, and to have a renewal upon the death of the old life, and upon the death of each of such two new ones, making, in all, four renewals.—Though the words “*under the like covenants*,” &c. occurred in the last noticed case, yet they were not considered as sufficient to prove that the intention was to grant a perpetual renewal.

The subject of covenants for renewal may be concluded by observing, that in cases where courts of equity would not enforce a specific performance of such a covenant, there courts of law will not give damages for an alleged or supposed breach of the covenant; courts of equity and courts of law putting, in fact, the same construction upon such covenants. *Eaton v. Lyon*, 3 Ves. 692. *Iggulden v. May*, 2 New Rep. 449. 7 East's T. R. 257. *Rubery v. Jervoise*, 1 Durnf. & East's T. R. 229.

(o) A covenant that *A. B.* may enjoy the lands for a certain length of time, being, as we have seen, held to amount to a lease, there seems no good reason why a covenant that he may take the profits for a certain period (which is enjoying the lands) should not also amount to a lease; or, in other words, give the covenantee a right *at law* to the enjoyment of the lands.—The covenant would certainly amount to an equitable lease.—For what words will amount to a lease, see *supra*, page 266, note (b), and *supra*, page 271, note (n).

(p) This act relates to bonds given by *ecclesiastical* persons, for granting leases beyond the period allowed by the act.

(q) On the authority of the case of *Pugh v. The Duke of Leeds*, a lease to commence from the day of the making (or from the day of the date) is a lease commencing *in presenti*; and therefore a lease for lives, made to commence from the day of the making, or from the day of the date, is good. See *supra*, page 270, note (a).

(r) Would be good, if it took effect under the Statute of Uses; or if there was a prior existing estate of freehold which was to continue till the period fixed for the commencement of the lease for life, as in that case the lease would be a lease arising out of the reversion, and consequently not liable to objection, as an estate of freehold commencing *in futuro*.

contingent precedent before, it begin in possession or interest, or upon a condition or limitation subsequent: but in case when it is to be reduced to a certainty upon a contingent precedent, the contingent must happen in the lives of the parties. And albeit there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain it is sufficient: *Id certum est quod certum reddi potest*. As for examples, if *A.*, seized of lands in fee, grant to *B.* that when *B.* shall pay to *A.* twenty shillings, that from thenceforth he shall hold the land for twenty-one years, and after *B.* doth pay the twenty shillings; in this case, *B.* shall have a good lease for twenty-one years from thenceforth (e). And if *A.* grant to *B.* that if his tenant for life shall die, that *B.* shall have the land for ten years; this is a good lease. And if one make a lease for years after the death of *C.*, if *C.* die within ten years; this is a good lease if *C.* die within the ten years, otherwise not. But if *A.* be seized of land in fee, and lease it to *B.* for ten years, and it is agreed between them that *B.* shall pay to *A.* an hundred pounds at the end of the said ten years, and that if he do so and shall pay the said hundred pounds, and an hundred pounds at the end of every ten years, that then the said *B.* shall have a perpetual demise and grant of the premises from ten years to ten years, continually following, *extra memoriam hominum*, &c. in this case, this, albeit it be a good lease for the first ten years, yet it is void for all the rest for uncertainty (f). And if a lease be made to begin from the Nativity of Christ, and he doth not say which Nativity, as next, &c. it is void for uncertainty (g). And

Co. super Lit. 45.
Plow. 83.
524.
Co. 6. 35.
1. 155.
Plow. 270.
Hil. 16 Jac. in the Exchequer.
Plow. 192.
yet 523.

(e) Or where a man makes a lease from the feast of *St. Michael* for so many years as *I. S.* shall name.—If *I. S.* name a certain term (in the life of the lessor) it is then a good lease by matter *ex post facto*. So it is of all leases which are to commence on a condition precedent.—6 Co. 35. b.

(f) *Quere*, might not this be considered as a lease for ten years certain, and for successive periods of ten years each for ever, upon the condition precedent of paying 100*l.* at the end of every ten years?—At all events, it would amount, it is conceived, to a covenant or agreement for renewal for successive periods of ten years each, and which would be enforced in equity. On enforcing agreements for the renewal of leases, see last page but two.

(g) Though leases should be certain as to the time of their commencement, yet if a lease is made to commence from its date, and the date is an impossible one, (as the 30th of *February*) in such a case as this the lease will be considered as commencing from its delivery. See Bac. Abr. tit. Lease (L. 1.) And where a lease has a correct date, but it is not specified from what period the lease is to take effect, there too it is held, that it shall take effect from the delivery; which will of course be from the date, supposing it was delivered on the day of the date. See Bac. Abr. tit. Lease (L. 1.) If, however, in a case like the last, the lease was a *reversionary* lease, the proper period from which to compute its commencement would, it is conceived, be the expiration or sooner determination of the prior lease. Where a time for the commencement of the lease is mentioned, as from the first day of *January*, but without saying in what year, or from the Feast of the *Virgin Mary*, but without saying whether the Feast of the *Annunciation* or of the *Purification*, in cases like these, it has been held, that the lease is void from the uncertainty of the time of its commencement. See Anon. 1 Mod. 180. Anon. Leon. 227. As, however, it is a well known rule in the construction of deeds, that they shall be interpreted as strongly as possible in favor of the grantee, there is some reason to contend, that leases (when made by deed) circumstanced like those in the two last noticed cases, might be supported;—as by holding the term in the former case to commence from the first day of *January* next ensuing the date of the lease; as holding it to commence at that time (unless in the case of a *reversionary* lease) would be the most beneficial to the lessee. So in the latter of the two last noticed cases, the lease might be held to commence from such of the Feasts of the *Annunciation* or *Purification* of the *Virgin*, as would be most advantageous to the lessee; and it might be held to commence at the Feast which happened either *before* or *after* the date of the lease, as would also be most advantageous to the lessee, in case the lessor's estate authorised him to grant it so as to commence either at

Co. 6. 36.

yet if a lease for years be made of land in lease for life, to have and to hold from the death of the tenant for life; this is a good lease: so if it be, to have and to hold from *Michaelmas* next after the death of the tenant for life; or from *Michaelmas* next after the determination of the estate of the tenant for life; these are good leases. So if there be a former lease in being for life or years, and another lease for years is made of the land, to have and to hold from the end of the former estate by surrender, forfeiture, or otherwise, for twenty years; or to have and to hold from the surrender, forfeiture, or other determination of the former lease, if there be any, and if there be none, for twenty years; these and such like leases are good, and this commencement is certain enough (x). And if one make a lease to begin after the death of *I. S.* and to continue until *Michaelmas*, which shall be in *anno Domini* 1650; this is a good lease.

Plow. 523. and
17 Jac. B. R.
Agreed.

Lit. Bro. sect.
437.
Bro. Grant.
154.
Co. 1. 2. 155.
Plow. 510.
521.
See Exposition
of Deeds.

If a man have a lease of land for an hundred years, and he make a lease of this land to another, to have and to hold to him for forty years to begin after his death: this is a good lease for the whole forty years, if there shall be so many of the hundred years to come at the time of the death of the lessor. But if the lessor [the lessee in the first lease is meant] grant the land to another, to have and to hold to him for and during all the residue of the term of an hundred years that shall be to come at the time of the death of the grantor; this is void for incertainty (y). And yet if in this case he grant all his estate, or all his term, or all his interest, in the premises of the deed, and then say, to have and to hold the land, &c. to the grantee for all the residue of the term of an hundred years that shall be to come at the time of his death; by this the whole estate and interest of the grantor in the land doth pass presently by these words in the premises of the deed (z). And if in this

• P. 274.

one time or the other. If indeed, in the two last noticed cases, the lease was a lease for lives, and not for a mere term of years, and if it could not be supported in case it was held to commence from a day to come, on the ground of its being a lease to commence in *futuro*, in that case, *ut res magis valeat quam periat*, it should be held to commence from the first day of *January last past*, or from the Feast of the Annunciation or Purification of the Virgin next preceding the date of the lease. —If the lease, in cases like the two last noticed, was a reversionary lease, it might, it is conceived, be held to commence on the first day of *January*, or the Feast of the Annunciation or Purification of the Virgin, first happening either before or after the expiration or sooner determination of the existing lease, as might best accord with the interest of the parties.

(x) Where a lease is made to commence from the expiration of a prior recited lease, and such recited lease does not in fact exist, or is a void one, it is held, that, in a case so circumstanced, the new lease shall commence presently. *Miller v. Mainwaring*, Cro. Car. 399. *Bussell v. Lewis*, 1 Lev. 77; and see *Rowe v. Huntington*, Vaugh. 73. 83, and Bac. Abr. tit. Leases, (L. 1). But where a reversionary lease is made to commence upon the expiration of a prior lease which is misrecited, and the misrecited lease is a valid one, there, generally speaking, the misrecital is unimportant, and the new lease will commence at the time intended, viz. the expiration of the misrecited lease. See *Halsewell v. Aylesworth*, 2 Roll. Abr. 55. *Foot v. Berkeley*, 1 Lev. 234. In a case where a reversionary lease was granted to *B.* to hold for twenty-one years, after the expiration of a prior term granted to *A.*, “to begin and be accounted for from the day of the date of these presents,”—these words were rejected, and the reversionary lease held to commence upon the expiration of the lease granted to *A.* *Seamer's case*, Godb. 166; and see also *Moore v. Musgrove*, Bridgm. 98, and *Mayn v. Beak*, Cro. Eliz. 515.

(y) Supposing an assignment of a term of years can be made to commence in *futuro*, (see *supra*, page 79, note (1),) in that case, the grant it is presumed would be good as an assignment of so much of the term as was unexpired at the time of the grantor's death.

(z) See *supra*, page 73, note (a), as to the *habendum* enlarging or controlling the premises.

this case the lessee for an hundred years make a lease of the land, to have and to hold after his death for an hundred years; this will be a good lease for as many of the first hundred years as shall be to come at the time of his death (a).

If *A.* make a lease to *B.* for ninety years to begin after the death of *A.* on condition to be avoided upon the doing of divers acts by others; and afterwards makes another lease of the land, *habendum* after the determination or redemption of the former lease; it seems this is a good lease and certain enough. But if a lease be made to *A.* for eighty years if he live so long, and if he die within the said term or alien the premises, that then his estate shall cease; and then he doth further by the same deed grant and let the premises for so many years as shall then remain unexpired after the death of *A.* or alienation to *B.* for the residue of the said term of eighty years, if he shall live so long; in this case, the lease to *B.* is void; for after the death of *A.* the term is at an end; but if he say for the residue of the eighty years, it is otherwise (b).

Per Justice
Bridgman.

Co. 4. 153.
Dier, 253.

If *A.* doth make a lease of land to *B.* for so many years as *B.* hath in the manor of *Dale*, and *B.* hath then a lease for ten years of the manor of *Dale*; in this case, this is a good lease for ten years. But if *A.* make a lease of land to *B.* for so many years as the land *B.* hath in execution shall be in execution; this lease is void for incertainty. And if a lease be made during the minority of *I. S.* or until *I. S.* shall come to the age of twenty-one years, these are good leases; and if *I. S.* die before he come to his full age, the lease is ended. But if a lease be made to another until a child that is now in its mother's belly shall come to the age of twenty-one years; this lease is not good (c). And if a lease be made for so many years as *I. S.* shall name; in this case, if *I. S.* do name a certain number of years in the life-time of the party lessor, this is a good lease. But if a lease be made for so many years, as the executor of the lessor, or of the lessee shall name; this lease is void.

Plow. 273.
523. 522.
F. N. B. 6. N.
14 H. 8. 11.
Co. 6. 85.

If a man make a lease for twenty-one years, if *I. S.* live so long; or if the coverture between *I. S.* and *D. S.* shall so long continue; or if *I. S.* shall continue to be parson of *Dale* so long; these and such like leases are good. But if *A.* make a lease to *B.* for so many years as *A.* * and *B.*, or either of them shall live, not naming any certain number of years; this cannot be a good lease for years (d). So if the

Co. super
Lit. 45.
Plow. 27.

• P. 275.

(a) Or rather, it is presumed, it would be an assignment, as embracing the whole of the lessee's interest. [The above case appears to be the same with the one put just above, where it is said that the grant is void for uncertainty.]

(b) See supra, page 271, note (g), upon a case which in substance appears similar to the above.

(c) As a child in *ventre sa mere* is now considered as a person in *esse*, (see *Woodford v. Thellusson*, 4 Ves. 322. 334,) it is presumed such a lease would be good; for there may be certainty or identity of person in such a case as well as in the case of a child actually born; and the lease it is presumed would commence immediately, unless some other period was fixed for its commencement.

(d) But it might, it is conceived, under certain circumstances, be good as a lease for lives—as if it was made to commence in possession, and livery of seisin was given.

the parson of *Dale* make a lease of his glebe for so many years as he shall be parson there; this is not certain, neither can it be made so by any means. And yet if a parson shall make a lease from three years to three years so long as he shall be parson; this is a good lease for six years, if he continue parson so long, and for the residue void for uncertainty (e). So if I make another a lease of land until he be promoted to a benefice; this is no good lease for years, but void for uncertainty (f).

Co. 6. 35.
14 H. 8. 10.
Plow. 274.

If I have a rent-charge of twenty pounds *per annum*, and let it to another until he have levied an hundred pounds; this is a good lease for five years. But if I have a piece of land of the value of twenty pounds *per annum*, and I make a lease of it to another until he shall levy out of the profits thereof an hundred pounds; this is no good lease for years, but void for uncertainty (g).

Plow. 27.
Co. 6. 35.

But here note in all these cases of uncertain leases made with such limitations as aforesaid, as until such a thing be done, or so long as such a thing continue, &c. that if livery of seisin be made upon them, they may be good leases for life determinable on these contingents, albeit they be no good leases for years (h).

Note.

Co. super
Lit. 46.
10 Ed. 3. 26.

And in some special cases a lease may be good notwithstanding some uncertainty in the continuance of it, for a lease may cease for a time and revive again, as if tenant in tail make a lease for years, reserving twenty shillings, and after take a wife and die without issue; in this case, as to him in reversion the lease is merely void, but if he endow the wife of the tenant in tail of the land, as to the wife it is revived again. So if tenant in tail make a lease for years, rendering rent, and die without issue, his wife *enicient* with a son, and he in reversion enter, in this case as against him the lease is void, but after the son is born the lease is good again if it be within the statute (i). So if tenant in fee-simple take a wife, and then make a lease for years and dieth, the wife is endowed; in this case she shall avoid the lease, but after her decease the lease shall be in force again.

Plow. 433. 421.
273.
Co. 1. 155.
Bro. Leases 73.
10.
Plow. 521.
Co. 4. 58.

If a lease be made for life, or years, to *A.*, and after the lessor doth make a lease for years by word (k), or in writing, to *B.* regularly, this concurrent lease to *B.* is a good lease at least for so many years of the second lease as shall be to come after the first lease is determined according to the agreement; as if the first lease to *A.* be for twenty years, and the second lease to *B.* be for thirty years, and both begin.

4. In respect of another lease then in being of the same thing.

(e) See *infra*, page 282, on the subject of leases by ecclesiastical persons.

(f) In what cases leases shall be void for uncertainty, see 1 Mod. 180. 1 Str. 651. 1 Ld. Raym. 737. Vin. Abr. tit. Estate (Y. a.) As to the commencement of a lease, see *ante*, page 273, and the references in the notes thereto; and with respect to the certainty requisite in leases, in regard to their beginning, continuance, and ending, see 2 Bl. Com. 143. Bac. Abr. Leases (L.) Com. Dig. Estates (G. 8.)

(g) See Co. Lit. page 42, note (a), *contra*.

(h) Not, it is conceived, where they are expressly made for years. See *supra*, page 270, note (d).

(i) See *infra*, page 279, on the subject of leases by tenants in tail, made under the stat. of 32 Hen. 8; c. 28.

(k) See *supra*, page, 271, in note (*), as to parol leases.

* P. 276.

Estoppel.

begin at one time; in this case, the second lease is good for the last ten years (l). And yet the reversion will not pass without the attornment of the tenant, and therefore if any rent be reserved on the first lease, the second lessee shall not have it until the first lessee doth attorn (m). But if the second lease be for the same or for a less* time, as if the first lease be for twenty years, and the second lease be for twenty or for ten years to begin at the same time; these second leases are for the most part void (a). And yet herein a difference is taken between leases made by matter of record and by deed, and leases that are made by word of mouth (o): for if the second lease be made by fine, deed indented, or poll, albeit it be but for the same, or for a lesser time, and albeit it be but a lease of the land itself, and not of the reversion, yet it will pass the rent reserved upon the first lease if the first lessee attorn, and so also it will do, without attornment, where attornment is not needful. But if the second lease be made by word of mouth it is otherwise, for a reversion and a rent in this case will not pass without deed, and therefore a grant by word doth not pass them. And if the second lease be by fine or deed indented, then also it will work by way of estoppel (p), both against

Dier, 58. 356.
Plow. 421. 422.
Co. 1. 155.

(l) It would commence in enjoyment, it is presumed, from the determination of the first lease, though such determination should happen before the expiration of twenty years. Where a second lease, commencing *in presenti*, is granted to the same person who holds under the first, the acceptance of the second, if it is a *good* lease, will operate as a surrender of the first. See *Bromley v. Stanley*, 4 Burr. 2210. But the acceptance of the new lease will not have this effect, supposing the new lease is a void one, or one that the lessee cannot enjoy.

(m) Attornment now unnecessary. See *supra*, page 253, note (a).

(n) If the former lease should determine by forfeiture, or should be surrendered to the second lessee, the second lease would immediately take effect in possession. See below, in the text, for further information on the subject.

(o) Cannot now be made by parol for more than three years. See the Statute of Frauds, 29 Car. 2. c. 3.

(p) Estoppel may be by fine, see *supra*, page 14, note (t). And in the case of a demise *for years*, a deed indented or a deed poll will operate as an estoppel. See *Bac. Abr. tit. Leases (O.)* 6 Mod. 258. 2 Ld. Raym. 1051. 3 T. R. 371. If however it appears by recital in the indenture or deed poll, that the lessor had nothing in the lands, in that case the indenture or deed poll will *not* operate by estoppel. 1 Ld. Raym. 729. Nor will there be any estoppel *where an interest actually passes by the indenture or deed poll*. The lease however will be good so far as respects the interest which actually passes by such indenture or deed poll, but not further. See *Co. Litt. 17 b*. The consequence of the doctrine of estoppel is—that if a person, by indenture or deed poll, makes a lease for years, or by fine makes either a lease for lives or for years of lands in which he has no interest, and afterwards purchases such lands, and takes a conveyance of the *legal estate* to himself, the lease will become good and bind the lands as effectually in the hands of the lessor, as if he had been seized of them when he made the lease. So a lease made by an heir apparent, or by a person claiming under an executory devise or contingent remainder, if the heir becomes seised, or if the executory devise takes effect, or the contingent remainder becomes a vested one, during the continuance of the lease, it (the lease) will immediately become good as against the lessor. And if the lessor, *subsequent* to the making of the lease, sells or otherwise disposes of the lands, the lease will bind them in the hands of the purchaser or other person claiming under the lessor. See *Bac. Abr. tit. Leases (O)*. But if the sale, &c. was made *before* the lease and by an instrument which would operate by estoppel, the lease would be bad; as the doctrine *qui prior est tempore potior est jure* must prevail in such a case. A lessee may be bound by estoppel as well as a lessor. Thus if a person accepts a lease by indenture of his own lands and *executes the lease*, he will be estopped at law from shewing they were his own lands; and he will be bound to pay the rent and perform the covenants. Equity however, it is conceived, would relieve in such a case. Estoppels however must be *mutual*, otherwise neither party is bound by them; therefore if a man takes a lease for years of his own lands from an infant or feme covert by indenture, this works no estoppel on either part, because the infant or feme, by reason of their disability to contract, are not estopped; therefore neither shall the lease be estopped. And if a man takes a lease of his own lands from the crown, he is not estopped; for

Dier, 112.
Plow. 432.

Co. 4. 53.

Co. 1. 155.
Plow. 432. 434.
Hil. 6 Jac.
Adjudged
Finch vers.
Vaughan.

Dier, 112.

Co. 2. 35. 36.

Stat. 32 H. 8.
cap. 28.
Co. super Lit.
44.

against the lessor and against the lessee, so that if the first lease happen by any means, as by surrender or otherwise, to determine before it be run out, then the second lessee shall have it; and if there be any rent reserved upon the second lease, the lessee must pay it from the time of the making of the lease (q). And therefore if one make a lease of land to A. for ten years, and after make a lease to B. of the same land from *Michaelmas* next for ten years, and before *Michaelmas* the first lessee doth purchase the fee-simple, so that now by this means his term is drowned; in this case the second lease shall begin at *Michaelmas*. So if one make a lease to A. for twenty years, and A. make a lease of the land to B. for two years, rendering rent, and after A. makes a lease for the rest of his time to C. by deed; this lease, if the lessee for two years do attorn, is a good lease of the rent and reversion; and so it is also without attornment, if there be any consideration given for it, for then it is also a good lease for all the rest of the term after the two years. So if one make a lease to A. for twenty years, if he live so long, rendering rent, and after he doth make a lease to B. by indenture for eighty years to begin presently, or grant the reversion to begin at a day past, or the like; in all these cases, if the first lessee attorn, the rent will pass (r), but if not, it will be a good lease of the land for so many of the years as shall be to come after the first lease ended. But if the second lease be by parol without a deed, the reversion, as a reversion, will not pass, and the grant will be void if there be nothing else to help it. And in cases where the second lease is void, albeit the first lessee surrender his estate, or his estate end by a condition; yet the second lease is not hereby made good. But if the second lease for years after another lease for life, or years, be made for money, so as it may be said to pass * by way of bargain and sale; this may help the matter, for in this case, albeit it be by word only (s), it may pass the reversion and the rent also: but in most cases it is good for the remainder of the term after the first lease ended. And if the second lease be to begin after the end of the former lease; in this case, the former lease is no impediment at all to the validity of the latter lease, but the latter lease is good notwithstanding.

Any person whatsoever of full age, that hath any estate of inheritance in fee tail in his own right, of any lands, tenements, or hereditaments, may at this day without fine or recovery make leases of such lands for lives, or years, and

* P. 277.

5. What leases or other acts, may be made or done by a tenant in tail: such and what leases made by such

a tenant shall be good to bind the issue, or him in remainder, or others after the death of the tenant in tail: and how they shall bind.

for as the King cannot be estopped his lessee shall not. Bac. Abr. tit. Leases (O). Cro. Eliz. 37. For further information respecting estoppels, see Co. Lit. 352. a. Bac. Abr. Leases (O).—and 3 T. R. 371.

(q) If the second lessee had no notice of the first lease, he ought not to pay rent till his lease took effect in possession, or at any rate only the same rent which he received from the first lessee.—A Court of Equity it is conceived would clearly relieve him in such a case from the payment of more.

(r) Attornment now unnecessary.

(s) Cannot, as we have before seen, be by parol for more than three years, and that only where the term commences in possession.

such leases shall be good, so as these conditions and incidents following, be therein observed and kept.

1. Such leases must be by deed indented, and not by deed poll, or by parol.

2. They must be made to begin from the day of the making thereof, or from the making thereof. And therefore a lease made to begin from *Michaelmas* which shall be three years after, for twenty-one years; or a lease made to begin after the death of the tenant in tail, for twenty-one years, is not good. But if a lease be made for *twenty* years to begin at *Michaelmas* next; it seems this is a good lease (t). Co. 5. 6. Dier, 246.

3. If there be an old lease in being of the land, the same must be surrendered, or expired and ended within a year of the time of the making of the new lease; and this surrender must be absolute and not conditional (u); also it must be real, and not illusory, or in shew only. For *factum non dicitur quod non perseverat*. Co. 5. 2.

4. There must not be a double or concurrent lease in being at one time (x), as if a lease for years be made according to the statute; he in the reversion cannot afterwards expulse the lessee and make a lease for life or lives, or another lease for years according to the statute, nor *è converso*. But if a lease for years be made to one, and afterwards a lease for life is made to another, and a letter of attorney is made to give livery of seisin upon the lease for life, and before the livery made the first lease is surrendered; in this case, the second lease is good. Spark's case, Trin. 4 Jac. B. R.

5. These leases must not exceed three lives, or twenty-one years from the time of the making of them (y). And therefore Co. 5. 6. Dier, 246.

(t) From this it would appear, that a lease for years made by tenant in tail under the Statute, need only be made to commence from the making, or from the day of the making, *where it is a lease for the full period allowed by the Statute*, namely, twenty-one years; and that where it is made for a shorter period, that *there* it may be made to commence *in futuro*, provided it will determine within twenty-one years from the time of making it:—as for instance; a lease for eleven years may be made to commence ten years after the making of it. It may be well doubted, however, whether the Statute warrants the granting of such a lease. On the contrary, there seems to be great reason to think, that it requires *every* lease (whether it may be for the full period allowed by the act, or for a shorter) to commence from the making, or the day of the making. The act says, that leases under it shall not be good if they exceed twenty-one years “*at the most*” from the making; which seems to mean, that if the term was for even *less* than twenty-one years, still it must be computed from the *making* of the lease; an opinion which appears to be strengthened by the circumstance of the act prohibiting the granting of “*any leases*” of lands already in lease, unless the existing lease is surrendered, or will end within one year from the granting of the new one. The Legislature could never mean to prohibit the granting of reversionary leases (even for a single year, unless the existing lease was within a year of expiring) and yet allow the granting of leases to commence *in futuro* where there happened to be no existing lease. There is therefore great reason to think, that *every* lease by tenant in tail under the Statute must commence *from the making*, notwithstanding the term for which it may be granted should be *less* than twenty-one years.

(u) If the surrender became absolute, or in other words if there was a complete extinction of the old term before the expiration of a year from the making of the new one, the statute, it is conceived, would be sufficiently complied with. The intention of the act appears to be, that leases under it shall, at the farthest, *commence in possession* at the expiration of a year from the making. See *Wilson v. Carter*, 2 Stra. 1201. A lease granted to a tenant who holds under an old lease will, if made to commence *in presenti*, cause a merger of the old lease, (see *Bromley v. Stanley*, 4 Burr. 2210, and see also *Grumball v. Roper*, 3 Barn. & Ald. 711) and the new lease will consequently be good, though there should be more than a year to come of the old one.

(x) There may be a concurrent lease, provided the first is within a year of expiring at the time of granting the second.

(y) For the words of the statute are, “to make a lease for three lives, or twenty-one years; so that either one or the other may be made, but not both.” Co. Lit. 44. b. See further Bac. Abr. tit. Leases (E.) rule 4.

therefore if tenant in tail make a lease for twenty-two or for forty years, or for four lives; this lease is void, and that not only for the overplus of time more than three lives or twenty-one years, but for that time of three lives or twenty-one years also. And it hath been resolved, that if tenant in tail make a lease for ninety-nine years determinable upon three lives; that this is not a good lease (z). But if a lease be made by a tenant in tail for a lesser time, as for two lives, or for twenty years, this is a good lease. And if a lease be made for four lives, and * it happen that one of the lives die before the tenant in tail die; yet this accident will not make the lease good, but it remains voidable notwithstanding (a).

* P. 278.

6. These leases must be of lands, tenements, or hereditaments manurable or corporeal, which are necessary to be let, and whereout a rent by law may be issuing and reserved. And therefore if a tenant in tail make a lease of such a thing as doth lie in grant, as an advowson, fair, market, franchise, or the like, out of which a rent cannot be reserved, especially if it be a lease for life; this lease is void, and that albeit the thing have been anciently and accustomably let. And a grant of a rent-charge therefore out of such lands is void. And if tenant in tail make a lease for three lives of a portion of tithes rendering rent; this lease is unquestionably void (b). And so also it seems it is if it be a lease for twenty-one years.

7. They must be of such lands, or tenements, which have been most commonly let to farm, or occupied by the farmers thereof by the space of twenty years next before the lease made, so as if it have been let for eleven years, at one or several times within twenty years before the new lease made, it is sufficient. And albeit the letting have been by copy of court roll only, yet such a letting in fee, for life, or years, is a sufficient letting, and so also is a letting at will by the common law. But these lettings to farm must be made by such as are seised of an estate of inheritance, for if it have been only by guardian in chivalry (c), tenant by the curtesy, in dower, or the like; this will not serve to be a letting within the intent of the statute (d).

8. There

Tallentine's
case, Pasch.
3 Jac. B. R.
Co. 11. 60.
Trin. 2 Jac.
B.R. Adjudged
Doddington's
case.

Co. 6. 37.
Dier, 271.

(z) Under powers to lease contained in settlements and wills, it is also held that a power to grant leases for lives or for years, does not authorize the granting of a lease for years determinable on lives. See *supra*, page 270, note (a). And this would appear to be a sound doctrine; for when it is considered that the power only authorizes the doing of a *certain, specific* thing, it would seem strange to contend that something might be done different from that which the power mentions. If any deviation could be made from what the power authorized, where, it may be asked, is the line to be drawn?

(a) It would be good as against the party making the lease, and voidable by the issue in tail. Where it is laid down in the text that the lease would be void, it is to be understood that it is not a lease agreeable to the statute, and not that it is absolutely void *ab initio* and as against every one; for as against the party making it, it is good.

(b) The act of the 5th Geo. 3. c. 17. makes leases of tithes and other *incorporeal hereditaments* by ecclesiastical persons, whether such leases are for lives or years, as good as if the leases were of *corporeal hereditaments*, and gives an action of debt to the successor for rent, which (in case of a freehold lease) he could not have brought at the common law; but the act just noticed does not provide for the case of leases of tithes or other *incorporeal hereditaments* by lay persons.

(c) Guardianship in chivalry abolished by the act of the 12th Car. 2. c. 24.

(d) Upon the words "usually or commonly demised" contained in powers in settlements and wills, a more extensive construction is put. See *supra*, page 270, note (a).

8. There must be reserved upon such leases yearly during the same leases, due and payable to the lessor and his heirs to whom the reversion shall appertain, so much yearly farm or rent, or more, as hath been most accustomedly yielded or paid for the lands, &c. within twenty years next before such lease made. And therefore if the rent be reserved but for part of the time of the new lease, this lease is void. And if the tenant in tail have twenty acres of land that have been accustomedly let, and he make a lease of these twenty acres, and of one acre more which hath not been accustomedly let, reserving the usual yearly rent, and so much more as to exceed the value of the other acre; this is not a good lease by the statute. So if the tenant in tail of two farms, the one at twenty pounds rent, the other at ten pounds rent, and he make a lease of both these farms together, at thirty pounds rent; this is not a good lease within the statute (e). But if besides the annual rent there have been formerly reserved things not annual, as heriots, fines, or other profit upon the death of the farmers, or profit out of another's soil, as pasturage for a colt, &c. if upon the new lease the yearly rent be reserved, albeit these * collateral reservations be omitted, yet these leases are good (f). And so also if there be more rent reserved upon the new lease than the rent that hath been anciently paid, the lease is good notwithstanding. And yet if tenant in tail of land let a part of it that hath been accustomedly let, and reserve the rent *pro rata*, or more than after the rate; this is not a good lease (g). And yet if two coparceners have twenty acres
- Co. 5. 8. 6.
6. 37.
Co. 6. 37. 38.
Trin. 5 Jac.
B. R.
Adjndged.
Adjndged
Trin. 18 Jac.
B. R.
Co. 5. 6.
- P. 279.

(e) This seems a narrow construction of the statute. If, however, two or more farms are demised by the same lease, reserving the ancient rents *separately*, there the lease will be good. See *Knight's case*, 5 Rep. 54 (b). In reserving rent upon leases under the statute, the amount of the rent should be specified—to reserve “the rent usually paid during the last twenty years,” would not do. See *Orby v. Mohun*, 2 Vern. 531:—though *quare*, might it not be shewn *what* rent had been usually paid during the last twenty years; and if it was so shewn, would not the reservation be good, on the ground, *id certum est quod certum redi potest*? See *supra*, page 270, note (a).

(f) Though the act speaks of reserving as much or more *yearly* rent, yet the intention of the act appears to be, that the rent reserved by new leases should be as *beneficial* as the rent usually paid during the preceding twenty years; and consequently if heriots or other things of a casual nature had been usually paid during the last twenty years, they ought, it is apprehended, to be reserved upon the new leases: And if the tenant for the last twenty years has usually paid taxes, made repairs, &c. the new lease, it is conceived, should throw these burthens upon the tenant, or an equivalent for them. See *Goodtitle v. Fumcan*, Dong. 544.

(g) The statute requires as much or more yearly rent to be reserved as has been most commonly paid during the last twenty years. If ten pounds a year has been most commonly paid for certain lands during the last twenty years, there does not appear to be any good reason why a lease of half the lands at a rent of 5*l.* should not be good; assuming that the other half is clearly not more valuable than the half which is demised. The issue in tail would be put to no trouble or expence in such a case, as he might be where lands before demised and others are demised at one rent; in which case he might be put to the trouble and expence of an apportionment; which may be a good reason for holding (as is the case), that a lease under a power is not good. But in the case under consideration he would be put to no such trouble or expence; and there seems nothing in the act to prevent a tenant from shewing, that half of the rent for half of the land was as much as had been usually paid for such half during the last twenty years; for there appears to be no reason (with reference to the operation of the statute) why an old rent may not be considered to issue, as to one part of it out of one part of the lands, and as to another part of it out of another part of them. It will be proper, however, to observe, in opposition to this reasoning, that the doctrine, that part of the lands comprised in the old lease cannot be let at an apportioned rent, was considered so well settled, that in order to alter it, so far as respected ecclesiastical possessions, the act of the 39 & 40 Geo. 3. was passed;—an act which will be more fully noticed when we come to the subject of leases by ecclesiastical persons. Where a tenant in tail wishes to let lands in distinct parts, which have before been let altogether, the effect of the doctrine above noticed may be avoided, by granting a lease of the whole of the lands, at one rent for the whole; and then for the lessee to assign the parts, at apportioned rents, to the parties for whom

Co. 5. 5.
And yet Co.
super Lit. 44.
b. is contra.

Trin. 3 Jac.
B. R. Corn-
wall's case.
Co. 5. 5.

Co. 5. 6.

acres of land of equal value between them in tail, and these have been usually let, and they make partition of these lands, so as each of them hath ten acres; in this case they may make leases of their several parts, reserving the half of the accustomable rent. And if upon the old lease the rent were payable at four days in the year, and by the new lease it is reserved to be paid at one day; this is not a good lease (*h*). But if the rent upon the old lease be payable in gold, and the new rent be payable in silver; it seems the lease is not good (*i*). And if a tenant in tail be of a manor, that hath been usually demised for ten pounds rent, and after a tenancy escheat, and then he doth make a lease of the manor, rendering ten pounds rent by the year: in this case, this is a good lease; but if the lessor purchase a tenancy, then it seems it is otherwise (*k*).

Co. 6. 37. and
Meer's case
Adjudged.

Stat. 11 H. 7.
20.
Co. 3. 51.

9. Such leases must not be without impeachment of waste. Waste.
And therefore if tenant in tail make a lease of his land entailed without impeachment of waste; this lease is void (*l*). And if a lease be made for life, the remainder for life, &c. this is not a good lease; for in this case, during the remainders, the tenant for life cannot be punished for waste done. But if such a tenant of land make a lease of it to *J. S.* for the lives of three others; this is a good lease, albeit it may afterwards become an occupancy.

10. Such leases must not be against any special Act of Parliament. And therefore if a woman that is tenant in tail of the gift of her deceased husband, or of any of his ancestors, while she is sole, or after with another husband, make any such lease warranted by this statute; yet this lease is not good (*m*).

11. They must have all due ceremonies and circumstances for the perfection of them, as other such like leases have, as livery of seisin, and the like, where they are needful (*n*).

And

whom such parts are respectively intended, or to declare trusts of such parts in their favour. There may, however, be some objection to this plan, as each part would be liable to be distrained upon for the whole rent. Equity however, if any party was compelled to pay more than his own part of the rent, would direct a contribution from the others; though, to prevent the necessity of any application to equity it would be proper for the parties to give each other mutual powers of distress, in case any of them should be compelled to pay more than his apportioned share of the rent: and the lessor himself might covenant only to require payment from each of the parties of his apportioned part. This would bind him, though not the issue in tail. It may be proper to observe, that if lands affected by the statute have usually been let, reserving a rent of 5s. an acre, and such lands are let with others, reserving a rent, for the whole, of 5s. an acre, the lease will be good. On the subject of reserving rent upon leases under powers, see *supra*, page 270, note (*a*).

(*h*) The statute, it may be observed, does not require that the rent shall be reserved in the same way or at the same times upon a new lease as it had been reserved upon the old one, but merely that as much or more yearly rent shall be reserved as has been most commonly paid for the last twenty years. Rent, however, clearly cannot be reserved *in advance*.

(*i*) The statute seems only to require that a rent equally beneficial with the one usually paid during the preceding twenty years should be reserved; consequently, such a construction of the act as requires the rent to be paid in the same denomination of money or other thing appears to be a very narrow and confined construction of it.

(*k*) *Quere* of this, unless the case was so circumstanced that the tenancy could not be considered as a part of the manor.

(*l*) Where it is said that the lease is *void*, all that is to be understood is, that it is not warranted by the statute; for it is clearly good as against the party granting it, and only voidable, and not void, as against the issue in tail.

(*m*) See *supra*, page 37, note (*q*), on the subject of women seised in tail of the gift of their husbands.

(*n*) These leases for lives are not like leases for lives under a power operating under the statute of Uses, and therefore may be made by feoffment, with livery, lease and release, bargain and sale enrolled, &c.

And then only when leases have these conditions, and are made according to these provisions, are they said to be within this statute of 32 H. 8. and such only as do bind the tenant in tail himself, and the issue in tail; for otherwise if it be not warranted by this statute, albeit it will bind the tenant in tail himself that made it, yet it will not bind his issue; but as to him it will be void, or voidable at the least: for if tenant in tail of land make a lease of it for an hundred years without any rent reserved thereupon; this lease as to the issue in tail is void (o): but if he make a lease of his land for an hundred years * rendering rent, and have issue and die; in this case the lease is only voidable by the issue at his pleasure; and therefore if the issue accept the rent after the death of the tenant in tail, by this means the lease is affirmed and become good (p). But howsoever the lease be made, it will not bind them that comes in of a remainder over, nor him that is the donor. And therefore if a tenant in tail make a lease warranted by the statute, and after die without issue, so that the land doth remain over to another, or revert to the donor; in these cases neither he in the remainder, nor the donor shall be bound by this lease, for as to them the lease is void (q). And yet by a common recovery the tenant in tail may make leases of, or lay charges upon the land to bind the donor and him in remainder also. But otherwise it is of a fine; for if tenant in tail make a lease for years by fine, this will nor bar the donor, nor the remainder in any case where it is in a stranger (r). And yet if the remainder be in the tenant in tail himself, and he make a lease for years by deed according to the statute or by fine; this lease is good, and shall bind his own remainder (s).

Co. 7. 7. 8. 34.
Dier, 7. 8.
The Woman's
Lawyer, 173.
Plow. 435.

Plow. 436.

* P. 280.

Acceptance.

6. What leases The husband may at this day without fine or recovery Stat. 32 H. 8.
or other acts, may be made make cap. 23.
or done by the husband with the lands he hath in fee-simple, or fee-tail, in the right of his wife, or jointly with her: and what leases made by him of such lands are good: or not: and how.

(o) *Quere*, if not only voidable?

(p) That is, good *as against himself*, but not as against his issue in tail; but if the estate tail failed with him and he had the immediate reversion in fee, then the lease would be good, not only as against himself but also against his heir at law or devisee.

(q) It would appear to be a narrow construction of the act, to hold, that it does not bind the remainder-man or reversioner. The preamble to the act clearly shew the object of the act to have been, to give security to leases granted by tenants in tail. The enacting part, it is true, does not expressly mention remainder-men or reversioners. It only says, that leases by tenants in tail, &c. shall be good against the lessors, their heirs and successors, in like manner as they would have been if such lessors had been seized in fee. A remainder-man or reversioner, it is true, is not, as such, an heir or successor; but as the preamble shews that it was the intention of the act to secure the interests of lessees against "such persons as have interests in the lands after the deaths of the lessors" (and remainder-men and reversioners may properly enough be considered as such), it would not seem to be putting a strained construction on a remedial act, to hold that it extended to remainder-men and reversioners.

(r) If the fine is with proclamations, it may work a bar by non-claim.

(s) It may be proper to observe, that the act prohibits the granting of leases of reversions of any lands, &c. It must therefore be clear, that it is only tenant in tail in possession who can make a lease authorized by the statute; consequently if tenant for life in possession and the remainder-man in tail join in making a lease, such lease, it is conceived, will not be a lease within the statute. For further information as to the doctrine of leases by tenant in tail, see Bac. Abr. tit. Leases (D). under the three following heads.—1st. What leases tenant in tail might have made by the common law.—2d. What leases he may make to bind his issue, since the statute 38 Hen. 8. c. 78.—3d. In what cases the issue in tail or strangers shall be bound by voidable leases made by tenant in tail:—and further in Vip. Abr. tit. Estate (l. a. 2.) Com. Dig. Estates (B. 32).

Co. super Lit. 44. make leases of the lands, tenements, or hereditaments, whereof he hath any estate of inheritance in fee simple, or fee tail, in the right of his wife, or jointly with his wife, made before or after the coverture; so as there be in such leases observed the eleven conditions or limitations before required in the leases made by tenant in tail; and so that the wife do join in the same deed, and be made party therunto, and do seal and deliver the same deed herself in person. **Pasc. 7 Jac. B. R.** For if a man and his wife make a letter of attorney to another to deliver the lease upon the land; this lease is not a good lease from the wife warranted by the statute. And yet then as in other like cases of leases not warranted by this statute, it is a good lease against the husband. And when the lease is such a lease as is warranted by the statute, it doth bind the husband and wife both, and the heirs of the wife: but if it be an estate tail, it doth not bind the donor nor him in remainder.

26 H. 8. 1. If the husband and wife at the common law had joined in a lease of her land without rendering of rent; this lease had been void as against the wife, and so is the law still.

26 H. 8. 2. Co. 2. 77. If the husband at the common law had been seised of land in the right of his wife, and he had made a lease for years rendering rent and died; this lease had been void [query voidable] and so is the law still.

Dier, 91. If the husband and wife at the common law had made a lease by word rendering rent; this lease had been void as against the wife; and so is the law still.

Stat. 32 H. 8. ch. 28. See the Woman's Lawyer, 163. * The husband and wife together may, by fine or recovery, make what leases they will of her land, or charge it for what time they will; and such leases and charges will be good against the husband and wife both and their heirs also. But if the husband alone do levy any fine of his wife's land, and thereby make any estate whatsoever; this will not bind the wife after the husband's death, but she may avoid it (t). And if the husband and wife make a lease of her land rendering rent to them and the heirs of the wife; (as in such leases it ought to be;) in this case, the husband cannot by fine or otherwise, grant or discharge this rent longer than during coverture, unless the wife join in the fine, but the rent shall descend, remain or revert, in such sort and manner as the land should have done (u).

* P. 281.

Bishops,

(t) This is not to be understood of her leaseholds for years, which the husband may alienate as he pleases; and he may grant an under-lease of them; and if he grants such under-lease, to commence even after his death, it will be good against the surviving wife. Com. Dig. tit. Bar. & Fem. (E. 2). 1 Cro. Eliz. 287. And wherever he can alienate or underlet his wife's leasehold by an actual assignment or lease, a contract or agreement for a lease will bind them in equity. And in the case of equitable terms of years belonging to a married woman, it is held, that the husband may alienate them, and that his wife is not entitled to a settlement out of them as out of other equitable property. See Mar. Set. page 345. Where a husband, however, has agreed for a valuable consideration to settle his wife's leasehold for years, there he can make no valid disposition of it except to a purchaser for a valuable consideration without notice and who gets the legal estate. If a husband makes a lease of his wife's freehold lands, such a lease is not absolutely void on the husband's death but voidable only by the entry of the wife. See *Jordan v. Wikes*, Cro. Jac. 332. & Hob. 5.

(u) See more fully as to leases by husband and wife by the common law or by statute 32 Hen. 8., in Bac. Ab. tit. Leases (C.) Com. Dig. tit. Baron & Feme (G. 3). 1 Wood 688, n. 2. to 13th edit. Co. Lit. 44, a. and Vin. Abr. tit. Baron & Feme (E. a. 10).

7. What leases or other acts, Bishops, or other spiritual or ecclesiastical persons, may make or do with the lands they have in the right of their churches or houses : and what leases made by such persons will bind their successors and others : or not.

Bishops, with the confirmation of the Dean and Chapter, Parsons or Vicars, with the consent of their Patrons and Ordinaries, Archdeacons, Prebends, and such as are in the nature of Prebends, as Precentors, Chaunters, Treasurers, Chancellors, and such like, also Masters and Governors and Fellows of any colleges or houses, (by what name soever called) Deans and Chapters, Masters or Guardians of any hospital and their brethren, or any other body politic, spiritual and ecclesiastical (*Concurrentibus his quæ in jure requiruntur*) might by the ancient common law have made leases for lives or years, or any other estates of their spiritual or ecclesiastical living for any time without stint or limitation (x). And at this day the Bishops, and the rest of the said spiritual persons, except Parsons and Vicars, may make leases of their spiritual livings for three lives, or twenty-one years, and such leases will be good both against themselves and their successors. But such persons may not make leases or estates for any longer time than for three lives or twenty-one years, and if they do, albeit it be by fine or recovery, or it be confirmed by the Dean and Chapter, &c. yet it is void as against the successor (y). Neither will the leases made by such persons for three lives or twenty-one years be good, unless they have certain conditions and properties required in them. These things therefore are necessarily required to be observed in the making of such leases : 1. That they have the effect of all the qualities or properties before mentioned and required by the statute of 32 H. 8. in the lease made by the tenant in tail, and be made after that pattern, viz. That they be by deed indented. 2. That they do begin from the time of the making of them (z). 3. and 4. That the old lease be surrendered (a), and there be not a concurrent lease (save in case of a Bishop). And therefore if any such person make a lease for twenty-one years to one, and then make a lease for three lives to another ; this second lease is void (b). And yet if a Bishop make a lease for twenty-one years to one man, and then within a year after make another lease to another for * twenty-one years to begin from the making of it, this, so as it be confirmed by Dean and Chapter is resolved to be a good lease (c). 6. That they do not exceed three

Co. super Lit.
44.
Co. 5 14. 11.
66.

Stat. 32H. 8.
ch. 28.
13 El. ch. 10.
1 Jac. ch. 3.
1 El. ch. 19.
14 El. ch. 11.
18 El. ch. 10.
20.

Co. super Lit.
44.
Co. 11. 66. 5.
3. 15.

* P. 282.

(x) On the subject of leases by lay corporations, see *supra*, page 267, note (A).
(y) Houses in corporations or market-towns may be let for forty years, at the accustomed yearly rent or more, provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them, and provided the lessees be bound to keep them in repair. See the act of the 14th Eliz. c. 11. [By virtue of this act, such houses, &c. may be exchanged for lands of equal value ; and see the act of the 55th Geo. 3. c. 147, as to exchanging parsonage houses, glebe lands, &c.]

(z) They must not be made, it is presumed, without impeachment of waste.

(a) Or be within three years of expiring.

(b) Not if the old lease is within three years of expiring. See the preceding note.

(c) See *Fox v. Collyer*, 1 Anders. 65. Mo. 107, pl. 251. On the authority of this case, archbishops and bishops grant concurrent leases with confirmation by dean and chapter. Great doubt, however, may be well entertained of the soundness of the decision in *Fox v. Collyer*, and consequently of the legality of the practice of granting concurrent leases.—The Editor begs to refer to Mr. Sugden's able reasoning upon this subject, in his *Treatise on Powers*, 2d edit. page 593.

three lives or twenty-one years, but they may be for a less time. 6. That they be of lands or tenements manurable or corporeal (d). 7. That they be made of lands that have been commonly let to farm by the space of twenty years before (e). 8. That there be reserved upon them the ancient and accustomed rent payable to the lessor and his successors during the time (f). 9. That they be not made without impeachment of waste. 10. That there be livery of seisin upon them, &c. where it is requisite. 11. If the lease be made according to the exception of the statute of 1 Eliz. and 13 Eliz. and not warranted by the statute of 32 H. 8. as in the case of a concurrent lease, and it be made by a Bishop, or any sole corporation, it must be confirmed by the Deans and Chapters, or others, that have interest (g). And if a Parson, or Vicar, make a lease, it is not good but during the Parson or Vicar's residence according to the statute of 13 Eliz. ch. 20. and in this case their needs no confirmation

Co. 11. 66. 5.3.

(d) The act of the 5th Geo. 3. c. 17, authorizes "archbishops and bishops, masters and fellows, or other heads or members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and every other person and persons who were enabled by statutes then in being, or any of them, to grant leases of lands, tenements, or other corporeal hereditaments for one, two or three lives, or for any term of years not exceeding twenty-one," to grant similar leases of tithes, tolls, or other incorporeal hereditaments. But masters and fellows or other heads and members of colleges, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or other ecclesiastical persons, not to grant leases for longer terms than their local statutes authorize them. The act gives an action of debt for recovery of the rent if in arrear twenty-eight days. This act, though it speaks in one part of all persons enabled by statute to grant leases, yet from its purview and general tenor it is tolerably clear that it must be considered to apply merely to spiritual persons.

(e) That is, for the greater part of twenty years, as for more than ten; but the letting need not be for one period of upwards of ten years.

(f) In order to remedy the inconvenience which arose from its being held, that lands, &c. belonging to spiritual persons which had been demised at one entire rent could not be divided and demised by separate leases at apportioned rents, the act of the 39 & 40 Geo. 3. c. 41, was made, which authorizes "archbishops, bishops, masters and fellows, deans and chapters, masters or guardians of hospitals, and other persons and bodies politic and corporate, having ecclesiastical or spiritual promotion," to demise lands, tithes, &c. which had been anciently demised by one lease at one rent, or at divers rents issuing out of the whole, to demise such lands, &c., or a part of them, by two or more leases at apportioned rents; but where the whole of the lands, &c. are demised by two or more leases, the apportioned rents must together be equal to, or more than the rent reserved by the old lease; and where a part of the lands, &c. are demised, and the rest retained in the hands of the lessor, the apportioned rent for the part demised must not be less, in proportion to the fine reserved on the lease, than the old rent bore to the last fine for the whole of the lands, &c. The act provides that no greater apportioned rent shall be reserved than the lands, &c. demised will afford a competent security for; and it also provides, that where specific things, incapable of apportionment, have been reserved by the old leases, such specific things may be wholly reserved in respect of a competent part of the lands, &c. The act also provides, that the colleges of the universities of Oxford and Cambridge, and also the colleges of Winchester and Eton, shall not, on leases made by authority of the act, reserve rent in any other manner or proportions than is required by the act of the 18th Eliz. c. 6; and it provides, that where old leases had provided for payment of money, &c. for the benefit of any third persons (over and above the rent to the lessor, as to vicars, curates, &c.) that such payments may be charged upon part of the lands formerly charged therewith, not being of less than three times the value of the payment charged thereon, exclusive of the rent reserved to the lessor; but the act not to confirm the claim of any vicar, &c. to any payment which depended upon the will or pleasure of the lessor. The act authorizes persons holding leases (to which the act relates) in trust, or who have granted under-leases, to make surrenders, notwithstanding the *cestui que trusts* are infants, femes covert, beyond seas, or otherwise incapacitated to act; the new leases to be for the benefit of the persons entitled to the benefit of the surrendered leases, and to be expressly so declared in the bodies of such new leases.

(g) See the preceding page, note (c), as to concurrent leases by bishops with confirmation.

firmation at all (k). 12. Some of the leases that are made by the colleges and houses of the university, &c. must have some rent-corn reserved upon them. But Bishops, Deans, Parsons, and such like spiritual persons, cannot grant the next advowsons of churches, neither can they grant rents out of their spiritual livings, but the same charges will be void after their death (i). And if a Bishop suffer an annuity to be recovered against him by a pretence of title of prescription, on a judgment after a verdict or confession; or a Parson in such a case pray in aid of the patron, and so suffer an annuity to be recovered; this will not bind the successor (k). And yet a Bishop, or any such spiritual person, may grant ancient offices of trust, of necessity, or conveniency, as the offices of chancellor, register, steward, bailiff, or the like; with the ancient fees incident thereunto, for the life or lives of the grantees; and such grants are good, albeit they be made by the Bishops of the new-erected bishopricks, and that there be not in them the conditions and properties required in the leases before mentioned, so as they be confirmed by the Dean and Chapter. But they may not grant any new office, nor yet add any new fee to the old offices. And therefore if a Bishop grant an annuity *pro consilio impenso et impendendo* where none was before; this will not bind the successor. And yet if there be an old fee, and there is a new fee added to it; in this case it seems it is good for the old fee, albeit it be void for the new fee. Neither may they grant their offices otherwise than they have been granted. And therefore where the ancient grants of the office have been to one, it cannot be now granted to two. And where the ancient grants have been to two jointly, they may not be now granted in remainder one after another. Neither may the grants of these offices be longer than for * the life or lives of the grantees. And in case where the grant is void, the confirmation of the Dean and Chapter will not make it good (l).

Stat. 18 El.
cap. 20.
Co. 5. 13. 11.
66. 10. 58.
Dier, 370.
And most of
these points
were agreed
by Justice
Jones and
Justice Whit-
lock at Lent
Assizes at
Glouc. 6 Car.

• P. 283.

But

(h) Leases by beneficed clergymen are restrained, in case of their non-residence, by statutes 13 Eliz. c. 20. 14 Eliz. c. 11. 18 Eliz. c. 11. and 43 Eliz. c. 9. (all repealed by the act of the 43 Geo. 3. c. 84; but this act was repealed by the act of the 57th Geo. 3. c. 99, whereby the above noticed acts of Eliz. were revived), which direct, that if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish, but that all leases made by him of the profits of such benefice, and all covenants and agreements of like nature, shall cease and be void, except in the case of licensed pluralists, who are allowed to demise the living on which they are non-resident to their curates only, provided such curates do not absent themselves above forty days in any one year. [As to the residence of spiritual persons, their granting leases, *taking farms*, &c. see the acts of the 43d Geo. 3. c. 84 & 109. 55 Geo. 3. c. 14. and 57 Geo. 3. c. 99.] By the stat. 22 Car. 2. c. 11. s. 75, intituled "An additional act for rebuilding the city of London, &c." *parsons and vicars in London* are impowered to lease their glebe for forty years, with the consent of the patron and ordinary. See fully as to leases by *parsons and vicars*, in Bac. Ab. tit. Leases (F).

(i) See the next note.

(k) Whether a parson can charge his ecclesiastical possessions with a rent-charge, so as to bind even himself, is a point upon which some doubt may be entertained. In Mr. Bythewood's Precedents in Conveyancing the point is very fully considered, and all the authorities on the subject noticed; and the conclusion to which Mr. Bythewood seems to come, is—that a parson *can*, as against himself, make a valid charge on his ecclesiastical possessions.

(l) As to the grant of offices, see *supra*, page 238.

Co. super Lit.
45. 329. 3. 59.
10. 59. 11. 73.
78. 5. 5.

But here note, that albeit in all these cases of leases and grants, not warranted by the statutes aforesaid, the statutes say the leases shall be void; yet this is to be understood as against the successors, and not against the lessors themselves; for the leases are good so long as the lessors live or at least so long as they continue in the place. And therefore if such a lease be made by a Dean and Chapter, or other corporation aggregate; it is good as against the Dean or other head of the corporation, so long as he doth continue in his place (m). And if a Bishop make any lease or other grant, not warranted by the statute of 1 Eliz. or a Dean and Chapter, Master and Fellows of a College, or the like, make leases not warranted by the statute of 13 Eliz. cap. 10. these leases are good against themselves, albeit they are void against their successors. So as if a private Act of Parliament doth entail land upon a man, and appoint him what estates he shall make, and that if he make any other estates they shall be void; in this case, they shall not be void as to the tenant in tail himself that doth make them.

Note.

Stat. 13 El.
cap. 20.

Leases of benefices with cure are no longer good than the Parson is resident.

Leases made by Colleges must have reserved upon them the third part of the rent in corn. See the statute of 18 Eliz. cap. 20. (n).

Co. super Lit.
55. 56. 270.
14 H. 8. 12.

If one make a lease to another, during the will and pleasure of him that letteth, or him that taketh, or both) for so in effect is every lease at will;) this is a good lease at will (o). So if one make a feoffment in fee, or lease for life, &c. and doth not make livery of seisin and so perfect the estate; the feoffee or lessee hath only an estate at will. But if a bargain and sale be made of land, and the same is void; or a corporation grant land, and the grant is void; by this there is no lease at will made (p).

8. What shall be said a good lease at will: or not.

Co. super Lit.
45. 3. 59. 65.
7. 8.

Leases for lives, or years, are of three natures; some be good in law, some be voidable by entry, and some void without entry. And of such as be good in law, some be good at the common law, as leases made by tenant in fee-simple notwithstanding they be for longer time than three lives or twenty-one years; some by Act of Parliament, as leases made by tenant in tail; leases made by a Bishop seised in fee in the right of his church, alone, without the Chapter; leases made by a man seised in fee-simple or fee-tail of land in the right of his wife, together with his wife, for twenty-one years, or three lives, according to the statutes. And of such leases as be void also, some are void at the common law; and that sometimes *in presenti*, as in the cases before

9. Where a lease for life or years shall be void *ipso facto* by the death of the lessor or by other means: or not, but voidable by entry, &c. and how.

of

(m) See the case of *Lloyd v. Gregory*, Cro. Car. 502, and the observation thereon in note (4), to the 13th edition of Co. Lit. 43, a.

(n) See the observations made on the restrictive statutes of 1 Eliz. c. 19. 13 Eliz. c. 10. 14 Eliz. c. 11. & 14. 18 Eliz. c. 11. and 43 Eliz. c. 29. in 2 Bl. Com. 321.—and further as to the doctrine of leases for lives or years by ecclesiastical persons, in Vin. Abr. tit. Estate (R. a. 6.) Confirmation (E.) Bac. Abr. tit. Leases (E.) Com. Dig. tit. Estates (G. 5).

(o) See *supra*, page 267, note (f), on the subject of leases at will.

(p) If the feoffment, bargain and sale, &c. could operate in any other way, it would pass the estate intended to be passed. See *supra*, page 86, note (d).

• P. 284.

of leases for years that have no certainty in them, or leases for lives made without livery of *seisin*, and the like. And some are void *in futuro*, as if a tenant in tail make a lease for years warranted, or not warranted, by the statute, and after die without issue; this lease is void as to him in reversion or remainder: *Cessante statu primitivo cessat derivatio*. So if a Prebend, Parson, or Vicar make a lease for years not warranted by the statutes; this is void by the death of the lessor, and the successor need not make any entry or claim to avoid it (g). So if a tenant for life make a lease for years, and after die; in this case the lease for years is void. And therefore in all these, and such like cases, no acceptance of rent after will affirm such leases. But otherwise it is in cases of leases for years made by Bishops, albeit they be confirmed by Dean and Chapter; and of leases made by Deans and Chapters, or tenants in tail; as to their successors and issues, when the leases are not warranted by the statutes: and otherwise it is also in the case of leases for life, made by these or any of the former lessors; for, in all cases of lease for life it must be avoided by entry, &c. and therefore such leases are not void but voidable, *viz.* the leases of Bishops and Deans after their death by their successors, and that by the statute law; and the leases of tenants in tail by their issues after their death, and that by the common law. And in these, and such like cases, the acceptance of the rent by the issue or successor will make good the lease, at least for their time (r).

Acceptance.

Acceptance.

If a lease be made for years on condition that upon such Co. 3. 65.
a contingent it shall be void; in this case, as soon as the
thing doth happen, the lease is void *ipso facto* without any
re-entry

(g) As to void or voidable leases by ecclesiastical persons, see Bac. Abr. tit. Leases (H).

(r) On the subject of void or voidable leases, see page 284 and 287, and *Doe v. Watts*, 7 Durnf. & East's T. R. 83. *Doe v. Butcher*, Dong. 50. A lease which is merely voidable, and not actually void, may be affirmed by acceptance of rent, or by any other act which sufficiently shews that the person accepting the rent, or doing such other act, treated or recognized the lessee as his tenant*.

In order, however, to make the acceptance of rent, or other act, have the effect of affirming a voidable lease, the person accepting the rent or doing such other act, must have notice that the lease is a voidable one; for, if he has not such notice, then neither the acceptance of rent, or any other act, will amount to an affirmation of the lease. Neither, it is conceived, will acceptance of rent, or any other act, amount to an affirmation, in case there is any circumstance which *repels* the presumption of affirmation. No such circumstance, however, is very likely to occur in the case of leases voidable *by issue in tail, &c.*; and it is voidable leases of this kind which we are at present more particularly speaking of. But such circumstances may frequently occur in the case of leases voidable for breach of covenant to repair, make good husbandry, &c.; the point will therefore be noticed more fully in treating of provisos or conditions of re-entry for breach of covenant, &c.

It may be proper to observe, that to make the acceptance of rent by issue in tail, &c. an affirmation of a voidable lease, the rent must be rent which has accrued *since* the issue's title to the lands accrued. See 4th Resolution in *Pennant's case*, 3 Rep. 64, and 3 Salk. 3.

With respect to leases actually void, and not merely voidable, no acceptance of rent (as we have seen in the text) will affirm or make them good. Acceptance of rent, however, will create a tenancy from year to year, and entitle the tenant to the usual notice to quit. See *Denn v. Rawlins*, 10 East's T. R. 261. *Doe v. Watts*, 7 Durnf. & East's T. R. 83. *Jones v. Verney*, Willes, 169. 3d Resolution in *Pennant's case*, 3 Rep. 64.

* In the case of *Hume v. Kent*, 1 Ball & Be. 554, looking on and allowing the lessee to lay out money in buildings, was held to be an affirmation of a voidable lease.

re-entry, &c. But if a lease for life be made on such a condition; in this case, the lessor must enter, &c. before the lease will be void (s).

(s) Conditions of re-entry for non-payment of rent, and for breach of covenants, are usually inserted in leases. Such conditions are of great advantage to the lessor, as they enable him to resume his property when it gets into the hands of a bad tenant. Conditions of re-entry usually run, "that if the rent shall be in arrear for the space of twenty-one days, being demanded at or at any time after the expiration of the twenty-one days, and not paid when demanded, or if the lessee, his executors, administrators, or assigns, shall fail in the performance of all or any of the covenants, articles, clauses, or agreements contained in the lease on the part of him, (the lessee) his executors, administrators, or assigns," (one of which covenants usually is, not to assign or underlet without the licence of the lessor) that in any of the said cases it may be lawful for the lessor to re-enter.* Where a lease is under a power, and the power prescribes the kind of condition of re-entry which leases made under it are to contain, care must be taken to make the condition in all respects in conformity with the power. Sometimes conditions of re-entry are extended to the bankruptcy or insolvency of the lessee, or his suffering his lease to be taken in execution; and conditions of re-entry in such events are perfectly valid. Though it is usual to give the lessor a power of re-entry for the breach of any of the lessee's covenants, yet to give a right of re-entry for the breach of any covenant, in any particular, however trivial, is, perhaps, going further than what is at all necessary in order to provide for the lessor's interest. Instead, therefore, of giving him a right of re-entry for the breach of any of the covenants, even the most unimportant, it might, perhaps, be more proper to give him a right of re-entry for the breach of the more important ones only: or a still better mode might be, to give him a right of re-entry for non-payment of rent and breach of the covenants against assigning or under-letting without licence, and also for the breach of all or any of the other covenants, and for the breach of which the lessor should recover damages in an action at law to a certain amount.

It may be proper to observe, that leases, instead of containing a power or condition of re-entry, sometimes contain a clause or proviso for *ceasing*, or *making the lease void* upon non-payment of rent, or breach of covenant. There is a material difference between the operation and effect of such a clause and a power or condition of re-entry. Under the latter, the lease does not become void by breach of the condition, but only voidable, and continues to subsist till the lessor re-enters for the breach; whereas, under the former the lease actually becomes void by non-payment of the rent, breach of covenant, &c. See *Jones v. Verney*, Willes's Rep. 169. *Marsh v. Curteys*, Cro. Eliz. 528; and see Co. Lit. 214*.

Though it has been stated (but subject to the oppugning doctrine noticed in the note at the bottom of this page), that a lease actually becomes void by force of a clause or proviso for *making it void* in case the event happens upon which it is made void, yet this must be understood with the exception of a common law lease for life or lives. If such a lease contains a proviso making it void for non-payment of rent, breach of covenant, &c. the non-payment of the rent or breach of covenant does not occasion an actual avoidance of the lease; but in order to make it actually void, the lessor must re-enter. The consequence is, that such a lease may be affirmed by the lessor at any time before he makes an actual entry. 5th Resolution in *Pennant's Case*, 3 Rep. 64; and, per Lord Kenyon, *Doe v. Wandlass*, 7 T. R. 120. But the doctrine that a proviso for making void a lease for lives does not actually avoid the lease, till re-entry by the lessor, only applies to the case of common law leases for lives; for a lease for lives, operating under the Statute of Uses, may be rendered void by means of a proviso. With regard to the distinction between leases void and voidable, it has been already observed, that a lease only voidable, and not actually void, may be affirmed or set up again, by the lessor waiving or dispensing with the forfeiture; but where it is actually void, there it is incapable of being affirmed or re-established. *Pennant's case*, 3 Rep. 64. *Bowering v. Boston*, Plow. 133. *Doe v. Watts*, 7 Durnf. & East's T. R. 82. *Doe v. Butcher*, Dougl. 50. Such

* In a note in the margin of Dyer's Reports, page 28 (a), it is stated, that it was held in *Cuxton's Case*, that a lease made void by proviso for non-payment of rent did not actually become void by reason of the non-payment, but that in order to have rendered it void, a demand of the rent should have been made; and no demand having been made, it was held, that the lessor should recover in an action of debt brought upon the lease, for rent accrued subsequently to the supposed avoidance of the lease. And, in a case noticed in the page facing the first page of the 2d volume of the 2d edition of Mr. Preston's Treatise on Conveyancing (which case will most likely be reported in the expected 5th volume of Maule & Selwyn's Reports), it was held, that the surety of a lessee (and consequently the lessee himself) could not set up the act or default of the lessee (though by the proviso made a cause of avoiding the lease) as a defence against the lessor. It would therefore appear, on the authority of the above noticed cases, (supposing them to rest upon a sound ground) that a lease made void by condition, does not actually become void by doing, or omitting to do, the act, for the doing or omitting to do which the proviso or condition avoids the lease, but that, in order to make it actually void, the lessor must treat it as void, and that, till this is done, the lease is to be considered as only voidable; and is therefore, it is presumed, capable of affirmance by such acts as would affirm any other voidable lease.

Such acts, however, as in the case of a mere voidable lease would re-establish it, will, in the case of a lease which is actually void, make the lessee a tenant at will, and entitle him to notice to quit. There is indeed one case of a lease actually void, in which, it is conceived, the lease will be revived or made good again; as where it has become void for non-payment of rent, and the lessor proceeds under the act of the 4 Geo. 2. c. 28; if equity should relieve the lessee (for the act, it is conceived, equally applies in the case of leases actually void for non-payment of rent as where they are only voidable by re-entry), in that case, the lease, it is apprehended, would become good again.

It may be proper to observe, that in the case of a proviso for re-entry for non-payment of rent, the lessor cannot take advantage of the proviso, or, in other words, make a re-entry without a proper demand being made of the rent, even though the lease should not expressly require such demand. See *Hanson v. Norcliffe*, Hob. 331. *Masham v. Goodere*, Freem. 242. *Doe v. Wandlass*, 7 T. R. 117. *Doe v. Lewis*, 1 Barn. & Ald. 619. *Lowat v. Lord Ranelagh*, 2 Ves. & Be. 24. *Bracebridge v. Bulkeley*, 3 Price's Ex. Rep. 200. But if the lessor proceeds under the act of 4 Geo. 2. c. 28, there needs no such demand, notwithstanding the language of the lease should be, that the lessor may re-enter if the rent is in arrear "being lawfully demanded." See *Doe v. Alexander*, 2 Manl. & Sel. 525. So if the power of re-entry should expressly say, that the lessor may re-enter if the rent is in arrear, "although no demand was made"; here, no demand would be necessary. See *Dorner's Case*, 5 Rep. 40.

Having seen that a forfeiture under a proviso or condition for re-entry may be waived or dispensed with and the lease affirmed or set up again, it will be proper to enquire what acts will amount to a waiver of the forfeiture. Where the forfeiture is for non-payment of rent, acceptance of the rent, with notice of the forfeiture, is held to amount to a waiver of it. See Dougl. 50. *Goodright v. Davids*, Cowp. 803. *Harvey v. Oswel*, Cro. Eliz. 572. 3 Rep. 64*.

So acceptance of rent, with notice of the forfeiture, is held to be a waiver, where incurred for assigning or underletting without licence. See *Mulcarry v. Eyres*, Cro. Car. 511. *Harvey v. Oswel*, Cro. Eliz. 572. *Roe v. Harrison*, 2 T. R. 425. And distraining for rent, even the same rent for the non-payment of which the forfeiture was incurred, will amount to a waiver. *Pennant's case*, 3 Rep. 64. 3 Salk. 3; but see 1 Stark. 411, and *Burrough v. Taylor*, Cro. Eliz. 462.

It is indeed generally held, it is believed, that acceptance of rent with notice of forfeiture, is a waiver of the forfeiture, whatever the cause of it may be. This doctrine is so important in its consequences, that it may be proper to enquire how far it is well founded, either on principle or authority. In making this enquiry, it will be proper to observe, that waiver of the forfeiture is not a consequence or conclusion of law, drawn from the fact of accepting rent with notice of the forfeiture, but acceptance of rent, with notice of forfeiture, is merely a circumstance to be submitted to the consideration of a jury, (*Doe v. Batten*, 1 Cowp. 243.) and for them to say whether it affords sufficient evidence of an intention on the part of the lessor to waive the forfeiture; so that the question, whether waiver or no waiver, depends, not simply on the fact of the lessor having received rent with notice of the forfeiture, but upon what was his intention; and the best way, it is conceived, of ascertaining such intention, is by looking at the consequences which would result to the lessor by holding acceptance of rent to amount to a waiver of the forfeiture. It is therefore of importance, in our enquiries upon the point under consideration, to keep this in recollection. In all cases where the lessor has either sustained no injury by the act occasioning the forfeiture, or is placed in the same, or as good a situation as he would have been in had there been no forfeiture, (as in cases of forfeiture for non-payment of rent, or for assigning or underletting without licence,) in cases of this kind no injurious consequence would result to the lessor from holding, that acceptance of rent, with notice of the forfeiture, was a waiver of such forfeiture; and therefore, in such cases, it may be fair enough to presume that he intended to waive it. But where the consequences of holding that acceptance of rent amounted to a waiver of the forfeiture, shew that the lessor could not intend to waive it, there a jury could never find, by their verdict, that he did intend it. If, for instance, the waiver of the forfeiture would materially prejudice or injure the lessor, such a circumstance would tend strongly to shew that he could never have intended to waive it. Thus, in cases of forfeiture for not building, repairing, or otherwise laying out money in improvements, in cases like these there seems to be reason to contend, that acceptance of rent, with notice of the forfeiture, could not be considered as a waiver of such forfeiture; because the prejudice or injury which the lessor might be doing himself by waiving it, would tend strongly to shew, that he did

* With respect to the affirmance of voidable leases by acceptance of rent, a distinction, it appears, has been made between the case of a lease rendered voidable by breach of condition annexed to the rent itself,—that is, rendered voidable by non-payment of the rent—and breach of a collateral condition, or condition relating to some other thing,—as assigning without licence, not making repairs, &c. In the former case, accepting (or distraining for) the very rent for the non-payment of which the forfeiture is incurred, will, (if it is accepted, or distrained for, before the re-entry is made,) amount to a waiver of the forfeiture, and consequently to an affirmance of the lease. See 1st & 2d Resolution in *Pennant's Case*, 3 Rep. 64, b. But in the latter case, it would appear, that it is only acceptance of rent which becomes due after the forfeiture, that will amount to an affirmance of a voidable lease. See *Pennant's Case*, ubi supra. To make the acceptance of rent by issue in tail or a remainder-man an affirmance of a voidable lease, it must be rent which accrued after his title to the possession accrued. See 4th Resolution in *Pennant's Case*, 3 Rep. 64.

† A waiver of one forfeiture is no waiver of a subsequent one:—thus, a waiver for one breach of covenant to repair, is not a waiver of a subsequent breach of such covenant; nor is a waiver for one underletting a waiver for a subsequent one. See *Doe v. Bliss*, 4 Taunt. 735.

did *not intend* to waive it, much more strongly to shew that he did *not intend* to waive it, than the acceptance of what he considered to be justly due to him, could possibly shew that he did.

As therefore there is a much greater probability, in such cases, that the lessor did not intend to waive the forfeiture, than that he did intend it, a jury would of course find that he did *not intend* it, and consequently would find that there was no waiver. And even if the case was one in which the lessor might have a remedy in equity, or though it might be one in which equity would relieve the lessor against the forfeiture, yet this, it is conceived, would be no reason for a jury coming to a different conclusion from that to which they would have come in case there had been no such remedy or relief in equity; for a jury, it is apprehended, could not enter into the consideration of equitable remedies or relief: And though the lessor might have some other remedy even at law, besides his power of re-entry, yet that should make no difference in the conclusion to which a jury should come; for it is conceived they could not enter into the consideration of remedies which might depend upon points and questions not before the Court, and consequently, whether the lessor might have any other remedy, could not be certain: and even if it was certain that other remedies did exist, yet they might not be so efficacious or beneficial to the lessor as his remedy by re-entry. Upon the whole, there seems, upon principle, to be great reason to contend—that where the *consequences* which would arise from holding the acceptance of rent to be a waiver of a forfeiture *more strongly shew*, that the lessor could *not intend* to waive it, than that he did intend to waive it; that *there* a jury must find there had been no waiver. In short, it is a mere weighing of probabilities; and if the lessor would sustain an injury (especially one of any moment) by waiving his right of re-entry, the probability is, that in accepting rent, he had *no intention* to waive it. As to authorities upon the point under consideration, the Editor may observe, that his opinion is countenanced by that of Lord Kenyon in the case of *Fryett v. Jeffrys*, 1 Esp. 393. It is true this is the only authority which he finds in support of the opinion which he has ventured to advance; but on the other hand, he finds none which can be fairly considered as decidedly opposed to his opinion. Indeed, in no case that he has met with, does the question appear to have been fully considered, as a question resting on the lessor's *intention*, and as such intention was to be inferred from *consequences*.—If a lessor, upon accepting rent, should distinctly declare his intention not to waive the forfeiture, it would be impossible, it is apprehended, to contend, that the acceptance amounted to a waiver; and, parol evidence, it is presumed, would be admitted to prove the declaration.

Though acceptance of rent is, in general, the circumstance which is considered as shewing an intention on the part of the lessor to waive a forfeiture or right of re-entry, yet other circumstances may equally shew such an intention. Thus, in the case of *Hume v. Kent*, 1 Ball. & Be. 554, allowing a tenant to lay out money in repairs, with notice of a forfeiture, was held to amount to a waiver of it.

Having considered in what cases a forfeiture, or right of re-entry, may be looked upon as *waived at law*, it will be proper in the next place to enquire, in what cases courts of equity will interpose and relieve against a forfeiture. In this enquiry, the act of 4 Geo. 2. c. 28, must be noticed. This act enacts, that in all cases between landlord and tenant, as often as it shall happen that *half a year's rent* shall be in arrear, and the lessor has right by law to re-enter for the non-payment thereof, such lessor may, without any formal demand * or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant is in actual possession of the premises, then to affix the same upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprised in such declaration in ejectment, and such affixing shall be deemed legal service thereof; which service or affixing of such declaration in ejectment, shall stand in the place of a demand and re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall be made appear to the Court, by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found upon the demised premises counter-*vailing* the arrears then due, and that the lessor had power to re-enter; then, and in every such case, the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or other person, claiming or deriving title under the lease, shall permit judgment to be recovered in such ejectment, and execution to be executed thereon without paying the rent and arrears together with full costs, and *without filing any bill for relief in equity within six calendar months after such execution executed*, then and in such case, the said lessee and all persons claiming under the lease, shall be barred and foreclosed from all relief or remedy in law or equity; other than by writ of error for reversal of such judgment, in case the same shall be erroneous; and the lessor shall from thenceforth hold the said demised premises discharged from such lease. And it is enacted, that in case the lessee, or other person claiming any right within the time aforesaid, file any bill for relief in any court of equity, he shall not have, or continue any injunction against the proceedings at law on such ejectment, *unless he shall, within forty days next after a full and perfect answer shall be filed by the lessor, bring into Court, and lodge with the proper officer, such sum and sums of money as the lessor shall in his answer swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor on good security, subject to the decree of the Court.* And

* In the case of *Doe v. Alexander*, 2 Maul. & Sel. 525, the Court held, that a lessor might have the benefit of this act without making any demand for the rent, notwithstanding the lease expressed that the lessor might re-enter if the rent was in arrear, "being lawfully demanded."

And the fourth section enacts, that if the lessee shall at any time before the trial in ejectment, pay, or tender to the lessor or his attorney in the cause, or pay into the Court where the cause is depending, all rent and arrears, together with the costs, then all further proceedings on the ejectment shall cease; and if such lessee or his assigns shall, *upon such bill filed as aforesaid, be relieved in equity*, he, she, and they, shall hold and enjoy the lands according to the lease, without any new lease being made.

It has been observed, as well by judges as by others, that the above noticed act enables courts of law to give relief against forfeitures for non-payment of rent. A careful perusal, however, of the act, will shew that it does no such thing. The first noticed section directs, that in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, and it shall be proved that half a year's rent was in arrear, and no sufficient distress found on the premises, that the lessor shall recover judgment and execution on the ejectment; and if the lessee shall not pay the arrears of rent and all costs, *and file a bill in equity for relief* within six months after execution on the judgment, then he shall be barred of all relief, both at law and in equity, except by writ of error, if the judgment is erroneous. This part therefore of the act, clearly gives no authority to courts of law to give the lessee any relief. And the next section enacts, that the lessee, upon filing any such bill in equity, shall not have any injunction against the lessor, unless within forty days after, the lessor puts in his answer, he (the lessee) pays the rent and costs into Court; so that by this section, even equity itself is restrained from giving the lessee any relief, except upon the terms prescribed; and much less does it give any authority to a court of law to afford relief. The next, and only remaining section enacts, that if the lessee at any time *before the trial*, pays, or tenders the rent to the lessor or his attorney, or pays it into Court, together with costs, that then all further proceedings in the ejectment shall be discontinued, and if the lessee shall, upon such bill filed in equity *be relieved*, (and which he must file at the latest within six months after execution on the judgment in ejectment, otherwise he will be barred of all relief,) then, that he (the lessee) shall hold his farm according to the lease. But this section gives no authority to a court of law, to afford any relief. It only directs, that in a certain case, the proceedings in ejectment *shall be discontinued*; and that, if equity affords relief, (upon a bill filed within the time prescribed by the act) then that the lessee shall hold his farm according to the lease; but (by necessary inference) that if equity does not afford relief, then that the proceedings in ejectment may be resumed. It must be clear, it is conceived, from this review of the act, that it gives courts of law no power to afford relief, and that relief can only be afforded by courts of equity. And it is equally clear, it is apprehended, that the act imposes no obligation even on courts of equity to afford relief, but only leaves them at liberty to afford it, (if they see sufficient reason) where the lessor files a bill for relief within the prescribed time, and pays, or tenders his rent and costs. All that the legislature intended with respect to the lessee, appears to be, that courts of equity should still have the power to afford relief, in cases where they would have afforded it, had the act not been passed, provided he applied in the way directed by the act. If however, a court of equity did not see sufficient reason to afford relief, or if the lessee did not apply for it in the way prescribed by the act, then the act clearly intends he should have no relief at all, or at least that he should have none in cases where the LESSOR pursued the course prescribed by the act.

This view of the act suggests an important question, viz.—whether, in cases of forfeiture, where the lessor cannot proceed according to the course prescribed by the act, (as where not so much as half a year's rent is due, or, being due, where there is sufficient distress on the premises,) and also in cases in which he does not proceed according to it, (for, it is conceived, a lessor is not bound to proceed according to it, but that he may proceed as he might have done had the act not been made,) whether in these cases, a court of equity cannot give relief just as it might have done, if the act had not been made. If (as it has been said, even by eminent judges) courts of equity have no power of affording relief in cases of forfeiture, except so far as such power is given them by the above noticed act, then it must be clear that the above question must be answered in the negative. But to suppose that the act gives courts of equity a power of affording relief in any case, would seem to arise from an erroneous view of it. It recognizes a pre-existing power in courts of equity to afford relief in cases of forfeiture, but it evidently intended to give them no new power, but rather quite the reverse; the intention being to restrain them in certain cases from giving relief, except the lessee complied with the terms prescribed by the act. In short, the object of the act is to afford landlords, who have a right of re-entry, the easy means, in certain cases, of exercising the right; and in such cases to take away all possibility of relief to the lessee, except upon the terms prescribed by the act*. This is evidently the only object of the act; and the legislature in restraining courts of equity from giving relief in certain cases, (except upon certain terms) cannot be considered as interfering with their right to afford relief in other cases.

If the above view of the act is a sound one, as it is conceived it is, in that case courts of equity can afford relief, not only in the cases mentioned by the act, but may afford it in all other cases in which they could have afforded it, had the act not been made. They may, therefore, it is apprehended, give the lessee relief, both in cases in which the landlord cannot, and also in those in which he does not proceed according to the act; and consequently that they may give it where the lessor re-enters for non-payment of less than half a year's rent, or re-enters where there is a sufficient distress on the premises. See *Doe v. Wandlass*, 7 T. R. 117. *Doe v. Lewis*, 1 Burr. 619.

It may be proper to observe, that if a lessor proceeds at law for a forfeiture for non-performance of covenants, as well as for non-payment of rent, the above noticed act would not seem to apply to such a case, except the lessor obtained a verdict for the forfeiture, on the ground of non-payment of rent merely. See *Lowat v. Lord Ranelagh*, 3 Ves. & Be. 24.

Having

* The act is not (as it has sometimes been supposed to be) an act for giving relief to the tenant, but to the landlord.

Having pretty fully considered the subject of relief against forfeiture for non-payment of rent, and it being clear, it is apprehended, that the above noticed act does not restrain courts of equity from giving relief in any case of forfeiture in which they might have given it in case the act had not been made, (except in the case provided for by the act, where the lessee does not seek relief on the terms prescribed by the act,) we will now proceed to enquire, whether courts of equity will afford relief to the lessee in cases of forfeiture for breach of covenant; as breach of covenant to repair, to expend money in improvements, for the management and cultivation of a farm, or in other cases of the like nature, which are called cases of *permissive* breach of covenant; *permissive* breach of covenant being the *neglecting* to do something that the lessee covenanted that he would do; and cases of *permissive* breach of covenant are distinguished from cases of *voluntary* or *wilful* breach of covenant; *voluntary* or *wilful* breach of covenant being the *doing* of something which the lessee covenanted that he would not do—as assigning or underletting without licence, pulling down buildings, ploughing up meadows, or things of the like kind. With respect to cases of *permissive* breach of covenant, it may be laid down, generally speaking, that courts of equity will give relief where compensation can be made. Thus in the case of breach of covenant for non-payment of rent, compensation can be made by paying the rent and interest; but relief in this case can only be afforded in the way above noticed. Breach of covenant to repair, is a case of *permissive* breach of covenant, but whether equity will afford relief in such a case, does not appear to be settled. The case of *Hill v. Barclay*, 16 Ves. 402. and 18 Ves. 56, is an important case on this subject. In this case, the lessor, according to a proviso for the purpose contained in the lease, gave the lessee notice to repair within three months*. The lessee neglected to do so, and the lessor brought an ejectment for the forfeiture: the lessee filed a bill to be relieved against the forfeiture, but Lord Eldon held he was not entitled to relief. Though his Lordship spoke of the case as a case of forfeiture for *wilful neglect* to repair†, yet he does not appear to have rested his decision so much upon that ground (though he laid a good deal of stress upon it) as upon the uncertainty there was in such cases, that equity can place the lessor in the same situation to all intents and purposes as if the repairs had been duly made according to the covenant. It must be confessed, that wherever it could not be rendered tolerably clear, even in cases of *permissive* breach of covenant, that the lessor would not be placed in as good a situation as he would have been placed in if the covenant had been duly performed, that there a strong ground of objection to affording relief would clearly exist. But if the Court ordered such repairs to be made as it conceived would put the lessor in as good a situation as if the repairs had been duly made, and if the lessor could not shew that they would not do so, it might be fairly assumed that they would; and consequently, upon the lessee making the repairs ordered within a time to be prescribed for the purpose, he should be relieved. In this way, it is conceived, relief might be afforded to the lessee, in the case of forfeiture for not repairing, without any prejudice to the lessor. It will be recollected however, that Lord Eldon's opinion was against any relief being afforded in such a case. But though his Lordship seemed to lay down the broad doctrine—that a lessee could not be relieved against a forfeiture for not repairing, yet he appears to have thought that relief might be afforded, where the lessee was prevented making the repairs by bad weather, or by fraud on the part of the lessor. His Lordship also expressed himself of opinion, that relief might be afforded in cases in which it would be *demonstrable* that the lessor would sustain no injury by affording the relief. With respect to cases of forfeiture for *permissive* breach of covenant, it is upon the very ground (as will appear from what has been already said) of its being *demonstrable* that the landlord would sustain no injury by the relief, that the relief ought to be given. But might it not be *demonstrable* in every case of forfeiture for not repairing, that the landlord would sustain no injury by the relief: or, in other words, might not the repairs be so made that it would be perfectly clear that the premises were put in as good order as they would have been in, if the repairs had been made according to the covenant? There certainly does not appear to be much difficulty in this: and if there is not, then there could be no objection to give relief in all cases of forfeiture for not repairing. It may be proper to notice the case of *Sanders v. Pope*, 12 Ves. 282, for the sake of shewing what were Lord Erskine's sentiments on the subject of affording relief against forfeiture. His Lordship observed, that “where the rigid exercise of a legal right (meaning a right of re-entry) would produce great loss and injury on the one hand, whilst, on the other, the lessor could have the full benefit of his contract, that there equity would interfere. This, it is conceived, is putting the interference of equity, in the case of forfeiture for *permissive* breach of covenant, upon a sound ground; and his Lordship expressed himself of opinion, that such interference was not confined to cases where the breach of the covenant (which gave the right of re-entry) arose from accident or ignorance, but he appeared to think, that relief might be administered even where the breach had been accompanied by a *wilful disregard* of the covenant, and this opinion, it is conceived, may be supported on sound principles, at least in the cases of forfeiture for *permissive* breach of covenant; for whether the breach is accidental, or committed in disregard,

* In addition to a covenant to repair generally, leases frequently contain covenants to make such repairs as the lessor shall deem necessary, and of which he shall give notice to the lessee. If the lessor requires certain specified repairs to be made, he cannot, after giving notice to make them, re-enter, for the breach of the covenant to repair generally. (See *Hill v. Barclay*, 18 Ves. 64.) If indeed there should be a breach of the general covenant to repair, after the repairs were made under the notice, in that case, it is conceived, he might re-enter for the breach of general covenant.

† Though the Lord Chancellor treated the case as a case of *wilful* neglect to repair, yet according to the above noticed definition of *permissive* and *voluntary* (or *wilful*) breach of covenant, the case was clearly only a case of *permissive* breach of covenant, and therefore a case in which relief ought to have been given, provided compensation could have been made to the lessor for the injury arising from the breach:—in short, the question of compensation appears to be the only one in cases of *permissive* breach of covenant.

disregard, as it were, of the covenant, the consequence with respect to the lessor (that is, the injury to the lessor) is just the same; and as the injury is the same, so such injury may be repaired as well in one case as in the other, consequently so far as concerns the lessor, there can be no more reason in one case than in the other for refusing relief. And with respect to the lessee, if the Court should refuse him relief as a *punishment for his conduct*, it must be clear, that the Court is exercising a jurisdiction of an extremely nice and delicate nature; for to say nothing of cases in which it might possibly be biased by party or personal feelings, it might often be embarrassed in deciding whether the *degree of disregard* or wilfulness in the breach of the covenant, was, or was not, sufficient to deprive the lessee of relief; for it could hardly be contended that the slightest degree of disregard to the performance of the covenant (such, for instance, as that put by Lord Erskine, in the case of *Pope v. Sanders*), would be sufficient to deprive him of it; and if not, then comes the question where is the line to be drawn; and if no line can be drawn, (and it is conceived none can) then not only must the Court feel itself often embarrassed, but there can be no certain data or ground upon which counsel can form an opinion, in cases such as we are speaking of, whether relief will be afforded or not. It is therefore conceived, that it would best accord with the substantial administration of justice, in cases of forfeiture for *permissive* breach of covenant, that relief should be afforded in *all cases where compensation can be made*, without at all regarding whether the breach was accidental, or accompanied by what might be deemed a wilful disregard of the covenant, for even in the latter case as well as the former, the lessor would obtain all that he could reasonably expect, viz. compensation for the breach of the covenant; and as to punishing of the lessee in the case of a wilful disregard of his covenant, the payment of costs might be a sufficient punishment.

Having entered fully into the question of affording relief against forfeiture for breach of covenant to repair *generally*;—it will be proper to enquire, whether relief will be afforded in the case of breach of covenant to make *specific* repairs, or to build. The Editor finds little information upon this point; but if the lessee is entitled to relief in all cases of permissive breach of covenant, where the lessor may be put in as good a situation as he would have been in had the covenant been duly performed, (and it is conceived he is so entitled) then, it is apprehended, he would be entitled to relief against forfeiture for not building or making specific repairs; for if the houses are as well built, and the repairs as effectually made, as they would have been, had the houses been built, or the repairs made within the time prescribed by the covenant, there can be no doubt but the lessor would be in as good a situation as he would have been in, had the covenant been literally performed; or probably even in a better, as the property is likely to be in better condition at the end of the term, than if the houses had been built, or the repairs made at the earlier period of the term. If, however, the kind of houses to be built, or the nature of the repairs to be made, were not sufficiently specified, it is conceived, a court of equity could render no assistance. See *supra*, page 271, note (*).

Leases sometimes contain a covenant on the part of the lessee, to lay out a *specific* sum in making repairs within a given time. Perhaps, such a case cannot be distinguished, on principle, from the case of a covenant to repair *generally*; and if not, there is reason to contend, that relief might be afforded upon the lessee putting the premises in as good repair, as the money covenanted to be laid out could have put them in, had it been laid out within the time agreed upon; but of course, expending a larger sum, should a larger be necessary in consequence of the premises getting into a worse state from the delay. This opinion is supported by the above noticed case of *Sanders v. Pope*, (12 Ves. 282); yet in the more recent one of *Hill v. Barclay*, 16 Ves. 406, Lord Eldon expressed himself in such a way, as if he thought relief could not be afforded in the case of forfeiture for not laying out a specific sum in repairs within a given time. As it would seem, however, that there could be no difficulty in putting the lessor in as good a situation as he would have been in had the money been expended within the prescribed period, the case would appear to be one in which relief might be given.

With respect to relief against forfeiture for not making good husbandry, the case of *Wadman v. Calcraft*, 10 Ves. 67, may be noticed. In this case * the lease contained a power of re-entry for non-payment of rent or breach of covenants; and amongst other covenants, were covenants to repair, hedge, fence, ditch, and in general to occupy the farm in a husband-like manner; and the Master of the Rolls held, that no relief was to be given against the breach of these latter covenants; and Lord Eldon, upon the case coming before his Lordship upon an appeal, expressed himself to the same effect: but if the doctrine is a sound one, that in cases of *permissive* waste, the lessee shall be relieved wherever compensation can be made to the lessor, (or, in other words, where he can be put in as good a situation as he would have been in had the covenant been duly performed) there would seem to be reason to contend, that relief should be afforded in a case like the above; for it is conceived, there could be no difficulty in such a case, in putting the lessor in as good a situation as he would have been in had the covenant been duly performed. In short, in *all* cases of forfeiture for *permissive* breach of covenant, in which the lessor can be put in as good a situation as he would have been in had there been no breach, relief, it is conceived, should be afforded †. But in *all* other cases (especially cases of forfeiture for *wilful* or *voluntary* breach of covenant) it would certainly be improper to afford relief.

In order the better to comprehend the ground of this distinction, it may be proper to notice the different consequences resulting to the lessor, in the case of voluntary or wilful breach of covenant to those

* And see *Lovat v. Lord Ranelagh*, 3 Ves. & Be. 24, and *Bracebridge v. Bulkeley*, 2 Price's Ex. Rep. 200.

† It has been held, that a lessee shall not be relieved against a forfeiture for breach of covenant to insure. See *White v. Warner*, 2 Meriv. 459. *Reynolds v. Pitt*, 19 Ves. 141. Though *quere* of the soundness of the doctrine, as the case is only one of *permissive* breach of covenant, and one in which the lessor can be put in as good a situation as he would have been in had there been no breach.

those which arise in the case of mere permissive breach of covenant. *Wilful or voluntary breach of covenant*, as we have before seen, is the doing of something which the lessee has covenanted that he would not do; and *permissive breach*, is neglecting to do that, which he has agreed that he would do. In the case of a covenant on the part of the lessee to do a certain thing, the lessor's object is, to have the thing done; and though a time is usually mentioned, within which it is to be done, yet the doing of it within the precise time is seldom a matter of any moment to the lessor; for, generally speaking, when it is done, though after the stipulated period, he, in fact, gets all he agreed for, and is put in the situation which he bargained for. Where the lessee therefore, has incurred a forfeiture, by neglecting to do the thing agreed to be done within the stipulated period, but still can do it so as to put the lessor in the situation he contracted for, it would seem to be agreeable to the principles of equity, to relieve the lessor from the forfeiture upon his doing that which he had covenanted to do. The ground of relief in the case of permissive breach of covenant, is, that the lessor gets what he had agreed for, and is put in the situation he had contracted for. This is a clear, intelligible, and sound ground of relief, and one which it conceived, there can be no difficulty, generally speaking, in acting upon. But in the case of *voluntary breach of covenant*, or breach of covenant not to do a certain thing, the lessor is deprived of what he agreed for, and cannot be put in the situation he contracted for; so that there is no resemblance between the cases of permissive, and wilful or voluntary breach of covenant; and as relief is afforded in the former case, because the lessor, notwithstanding the literal breach of the covenant in fact, gets all he agreed for, and is put in the same situation as he would have been in had the covenant been duly performed; so, in the latter case, relief is properly refused, because the lessor is deprived of what he agreed for, and cannot be put in the situation he contracted for. To afford relief, in short, in the case of *voluntary breach of covenant*, would have the effect of holding, that the lessor should not have the power of imposing any terms of a restrictive nature upon the lessee; doctrine which would have the effect of substituting the will of the Court for that of the lessor, and depriving him of the power of letting his property upon his own terms. We may therefore consider it as clear, that relief will not be afforded in the case of voluntary or wilful breach of covenant: It will not therefore, be afforded in the case of assigning or under-letting without licence, for these are cases of voluntary breach of covenant*. *Lotat v. Lord Ranelagh*, 3 Ves. & Be. 24. *White v. Warner*, 2 Meriv. 459. *Reynolds v. Pitt*, 19 Ves. 141. [If a feme lessee is restrained, by condition, from assigning, &c. without licence; an assignment, without licence, by her husband, will occasion a forfeiture. See *Thornhill v. King*, Cro. Eliz. 757.] So ploughing a particular field, where the lessee has covenanted not to plough it, ploughing up a bed of furze, or things of the like nature, are also cases of wilful or voluntary breach of covenant, and will not be relieved against. And in a case where the lessee covenanted not to suffer persons to make use of a private way over the demised premises, it was held that a forfeiture for breach of this covenant could not be relieved against. See *Descarlett v. Dennett*, 9 Mod. 22. Though assigning or under-letting will occasion a forfeiture, and such forfeiture, as we have already seen, will not be relieved against; yet it must be an *actual* assignment or underlease, for a mere agreement for one will not occasion a forfeiture, unless indeed the proviso or condition expressly made such agreement a cause of forfeiture. And depositing the lease as a security for a debt, will occasion no forfeiture unless the proviso or condition expressly makes it so; but the creditor, it is presumed, would, by means of such deposit, gain nothing more than a mere equitable lien on the lease, and no security, either at law or in equity, on the premises demised by it. From the case, however, of *Doe v. Bevan*, 3 Maul. & Sel. 353, it may be inferred that the creditor would become an equitable mortgagee by the deposit of the lease; for in the case just mentioned the lessee having become a bankrupt, the Lord Chancellor ordered the lease to be sold for payment of the debt due to the creditor; thereby treating the deposit of the lease as an equitable mortgage. It does not appear, however, from the report of the case in Maule & Selwyn, on what ground his Lordship ordered the lease to be sold—he might, probably, make the order as a thing of course, and without knowing that the lessee was restrained from assigning; but however this might be, it must be evident, that if a lessee, who is restrained from assigning, can make an equitable mortgage, that he in fact gets quit of the restraint. It may therefore be considered as tolerably certain, that a lessee who is restrained from assigning cannot make either a legal or equitable mortgage; and that if he attempts to make a legal one, by an *actual assignment*, he will incur a forfeiture, and if he attempts to make an equitable one,

* The case of *Northeote v. Duke*, Amb. 511, seems to be an authority for holding, that if a person assigns or underlets without notice of the condition which restrains him from doing so, that equity will relieve him against the forfeiture. In the case just noticed, the devisee of a leasehold for lives (the lessee being authorized to devise the premises) made an underlease, without licence, for fourteen years, though the lease only allowed an underlease for seven; and Lord Northington expressed himself of opinion, that the circumstance of the devisee having no notice of the condition (the lease never having been in his hands) was a ground for relieving against the forfeiture. The soundness however of this opinion may, perhaps, be questionable. The rule *ignorantia non excusat*, it is conceived, might well apply where the party had the means of information, and did take the trouble to obtain it; and from any thing that appears to the contrary, the devisee, in the case just noticed, might, if he had pleased, have seen the lease, and consequently could have ascertained whether he could make the underlease or not. Not only, however, was Lord Northington of opinion that equity could relieve in such a case, but from the way in which his Lordship expressed himself (according to the report of the case), it would appear that he even thought no forfeiture had been incurred, as the fourteen years term (for which the devisee had underlet) was not an *absolute certain term*, but might determine any day by the death of the cestui que vie. But this opinion also of his Lordship, it is conceived, is not a tenable one, for if it is, the consequence would be, that in a lease for lives, the lessee must be either restrained in toto from under-letting, or he is not restrained at all; a position which cannot for a moment be supported.

one, either by a deposit of the lease or otherwise, the mortgagee will acquire no interest in the property.—In the latter case however, the lessee will incur no forfeiture, unless making a deposit of his lease should be made an *express cause* of forfeiture. Though an *agreement* for an assignment or underlease will not occasion a forfeiture, where the proviso is only against an *actual assignment* or underlease, yet this is to be understood of leases in which the agreement is not accompanied by delivering possession of the premises, for where it is accompanied by delivering possession, a forfeiture will be incurred. Thus, in the case of *Roe v. Sales*, 1 Maul. & Sel. 297, a lessee who was restrained from assigning or under-letting all or any part of the premises, without licence, agreed, upon taking a person into partnership with him, that the partner should have the entire use of certain parts of the house, of which part he took possession accordingly; and the lessee was held to have incurred a forfeiture. And where possession is delivered, a forfeiture will be incurred whether the agreement is a written or a mere parol one; and where a lessee is restrained from assigning or under-letting all or any part, an assignment or under-lease of a part will occasion a forfeiture. *Roe v. Sales*, 1 Maul. & Sel. 297; and even if he is not expressly restrained from assigning or under-letting a part, yet, it is conceived, an assignment or underlease of part would occasion a forfeiture, otherwise by reserving some small part out of the assignment or under-lease, the effect of the proviso or condition might be completely evaded; and though it is true, conditions in restraint of alienation are construed strictly, yet they must not be so construed as to vitiate any rule or maxim of law—the maxim *omne major in se minus continet*, applies, it is conceived, to the case under consideration, and, consequently, where the lessee is restrained from assigning or under-letting the premises generally, he is restrained from assigning or under-letting any part of them. Conditions, however, in restraint of alienation are so far strictly construed, that where the proviso or condition is only against assigning, there an under-lease may be made. See *Cruso v. Bugby*, 3 Wils. 234. But if the proviso or condition restrains the lessee from assigning, or parting with all or any part of his estate and interest in the premises; or from parting with the premises for all or any part of the term; in these and similar cases, an under-lease, as well as an assignment, will occasion a forfeiture. So, restraining him from “letting or assigning” will prevent his under-letting. See *Roe v. Harrison*, 4 Term Rep. 425. And a proviso or condition not to “let or demise” the premises, will restrain the lessee from making an assignment. *Greenaway v. Adams*, 12 Ves. 395. It will be proper to notice, that where the lessee is restrained from assigning, an assignment, as his own personal act, is only prohibited, and that an assignment by operation of law may nevertheless be made; as in case he becomes a bankrupt, the premises will pass to his assignees by the assignment from the commissioners, and the assignees may sell to a purchaser. See *Doe v. Bevan*, 3 Maul. & Sel. 553; *Philpot v. Hore*, 2 Atk. 219. *Doe v. Smith*, 5 Taunt. 795. And here it may be observed, that a purchaser from the assignees may assign or underlet the premises to whom he pleases,—such purchaser not being affected by the proviso or condition. See *Doe v. Smith*, 5 Taunt. 795. And even if the lessee should himself be the purchaser, or should afterwards become possessed of the premises, he will be no longer restrained by the proviso. See last cited case.

An assignment by the sheriff, under an execution *bonâ fide* sued out against the lessee's goods, is an assignment by operation of law, and good, notwithstanding a condition in restraint of assignment. See *Doe v. Carter*, 8 Term Rep. 57.* But if the execution is a fraudulent contrivance to evade the condition, the assignment under an execution cannot be sustained, but would be set aside as against the lessor. See *Doe v. Carter*, 8 Term Rep. 300. It might, perhaps, be thought that an assignment under the Insolvent Debtors' Act was an assignment by operation of law. In the case, however, of *Shee v. Hale*, 13 Ves. 404, such an assignment was held (and properly, it is conceived) not to be an assignment by operation of law, but an assignment by the act of the party, and consequently occasioned a forfeiture. [In assignments under the Insolvent Debtors' Act it might be advisable to except property which the insolvent is restrained from assigning, so as to afford the assignees an opportunity to come to some agreement with the lessor and lessee for the benefit of the creditors.]

But although a proviso or condition in restraint of assignment by the lessee, does not prevent an assignment by operation of law, yet, as we have before seen, a proviso or condition to restrain assignments by operation of law may be inserted in leases—as by giving the lessor a right of re-entry upon the lessee becoming a bankrupt, (*Doe v. Bevan*, 3 Maul. & Sel. 553. *Roe v. Galliers*, 2 Durnf. & East's T. R. 133) or upon his goods being taken in execution. 8 Term Rep. 57. 300. So, a right of re-entry may be given to the lessor, upon the lessee compounding with his creditors, taking the benefit of an Insolvent Debtors' Act, or, in short, upon any other lawful event which the parties may agree upon. Where

* In the case of *Doe v. Clarke and Browne*, 8 East's Term Rep. 185, a lease was granted to *Clarke*, his executors, &c. for twenty-one years, if he, his executors, &c. should so long continue to inhabit or dwell, with his and their family and servants, in the said farm-house, and should so long continue actually to occupy the premises, and not let, set, assign over, or otherwise do part with the lease and premises to any person whomsoever. The lease contained a covenant on the part of the lessee, not to sell, assign, or otherwise part with the premises; with a proviso, that if any of the covenants should be broken, the lessor might re-enter, and the lease should be void. The lessee became a bankrupt, and his assignees took possession of the premises, and the lessee relinquished the possession; and it was held that the lessor had a right to recover the possession, and that he might maintain an ejectment without any previous entry, as the lease became totally void upon the lessor ceasing to reside.

† Where a lessee merely covenants not to assign, under-let, &c. without any right of re-entry being reserved to the lessor for breach of the covenant, if the lessee, in such a case, makes an assignment, under-lease,

Where a lessee is restrained from assigning without licence, it seems to be a point not very clearly settled, whether a forfeiture is incurred by his *devising* the property. In the case of *Fox v. Swan*, Styles 483, it was held that it did not; and Mr. Justice Bayley, in the case of *Doe v. Bevan*, 3 Manl. & Sel. 361, observed, "that there had been a general impression upon the minds of the profession, for a series of years, that a *devise* by a lessee was not a breach of a covenant not to assign." The cases, however, of *Berry v. Tunstun*, Cro. Eliz. 330. and *Knight v. Mory*, 2 Term Rep. 425. support a contrary opinion; and as a *devise* is certainly not an alienation by operation of law (and it is only in the case of alienation by operation of law, that no forfeiture is incurred, unless such an alienation is made an express cause of forfeiture) there would seem to be some reason to contend, that a *devise* by the lessee, where he is restrained from assigning without licence, would occasion a forfeiture.

Where a proviso against assignment, contains an exception of a *devise* or *assignment by will*, it may be hardly necessary to state, that in such a case the lessee may *devise*. *Lloyd v. Cripe*, 5 Taunt. 492.

If a lessee is restrained by condition from assigning or under-letting, except to a particular person, if an assignment or under-lease is made to such person, he is not restrained from assigning or under-letting to any other. See Com. Dig. tit. Condition (F.); but see *contra*, *Thornhill v. King*, Cro. Eliz. 757.

Provisoes or conditions against assignment generally run, that if the lessee, his *executors, administrators*, or assigns, shall assign without licence, the lessee may re-enter: and where such is the language of the condition, the executors or administrators are restrained from assigning. See *supra*, page 123, note (q), and see *Lloyd v. Cripe*, 5 Taunt. 449, and *Sir William Moore's Case*, Cro. Eliz. 26.

If a lease is granted to a man, his executors, administrators, and assigns, and then a proviso is inserted, restraining him from assigning *generally*, the proviso, in such a case, is considered as repugnant, and consequently void; but if the proviso only restrains assignment without the lessor's licence, or to a particular person, &c. there there is no repugnancy and the proviso is good. *Weatherall v. Gearing*, 12 Ves. 504.

Where a lessee is under no restraint as to assigning, he may of course assign to whom he pleases, except that it seems to be understood that equity would, in certain cases, restrain him from assigning to a person who was insolvent. 1 Fonb. 360: And where the lessee is not expressly restrained from assigning, he may assign, notwithstanding the lease is only granted to him, his executors and administrators, emitting the word "assigns." See *Church v. Brown*, 15 Ves. 364.

Having considered what will amount at law to a waiver of a forfeiture, and in what cases equity will relieve against forfeiture, and having just noticed such cases as are or are not to be considered as amounting to a forfeiture within the true meaning of the proviso or condition for re-entry or making the lease void, it may be proper to advert to the doctrine relative to *dispensing* with the proviso or condition; and on this subject it may, perhaps, be sufficient to refer to what has been already said on the subject in the Chapter on Conditions, (page 126, note (e)), observing, however, that the weight of authority is in support of the doctrine, that where a licence is once granted to assign, the assignee may assign without any further licence. See *Bennett v. Macpherson*, 14 Ves. 173. and *Machon v. The Foundling Hospital*, 1 Ves. & Be. 191. The case, however, of *Thornhill v. King*, Cro. Eliz. 757, opposes the doctrine; and in the above noticed case of *Machon v. The Foundling Hospital*, the Lord Chancellor, though he acquiesced in it, called its soundness in question.

Where a licence in *writing* is required, as is generally the case, a parol licence will not dispense with the condition. See *Roe v. Harrison*, 2 Term Rep. 425. and Serjt. Williams's note to 1 Saund. Rep. 287. But where a parol licence is given with the fraudulent intention of entrapping the lessee, equity would interfere in such a case, and relieve against the forfeiture. See *Richardson v. Evans*, 3 Madd. 218. [*Quare*, as the lessee must know the terms upon which he may assign, it is not his own fault not to require a written licence where the lease requires a written one?]

As to the question, who may take advantage of conditions broken, or, in other words, who may re-enter for the forfeiture incurred by breach of the condition—for information upon this subject the Editor begs to refer to the Chapter on Conditions, page 150, et infra, and the notes; *Pennant's Case*, 3 Rep. 5. *Doe v. Bateman*, 2 Barn. & Ald. 165.—It may be proper to observe, that where a lessee enters into express covenants for payment of the rent, or for doing any other thing, he, his heirs, (if bound by the covenant, and having assets by descent) and his executors and administrators, if they have assets, will be bound by such covenants, notwithstanding the lessee may assign all his interest in the lease. Where, however, the lessee becomes a bankrupt, and his assignees accept the lease as part of his effects, he is released from the payment of rent from the time of such acceptance, and from actions for the breach of covenant. See the above-noticed act of the 49 Geo. 3. c. 121. s. 19; and see *Onslow v. Corrie*, 2 Madd. 330: And where the lessee dies possessed of the lease, if the premises are productive of no profit to his executors or administrators, they may give up the lease to the lessor; and if they offer to do so, they are not afterwards liable to pay the rent, nor to the performance of the covenants. See *Remnant v. Bremridge*, 2 J. B. Moore's Rep. 94, and cases there cited.

CHAP.

under-lease, &c. no forfeiture will be incurred; he will, however, be subject to an action for damages, except he becomes a bankrupt, and the assignees accept the lease as part of his effects, in which case he will not be liable to the payment of rent after such acceptance, or to any action for the breach or non-performance of his covenants. See 49 Geo. 3. c. 121. s. 19. [If the assignees decline to determine whether they will accept the lease or not, the lessor may apply to the Lord Chancellor by petition, praying that the assignees may either accept the lease and premises, or deliver them up to the lessor, and the Chancellor is authorized to make such order as he shall deem just.]

CHAP. XV.

OF A FEOFFMENT, GIFT, GRANT, AND LEASE.

1. Where and by what means a feoffment, gift, grant, or lease, and the estate thereby made, being good at first, becometh void by matter *ex post facto*, and may be avoided: or not: and how.

* P. 285.

A FEOFFMENT, gift, grant, or lease in writing, may become void by rasure, interlining, and the like, as hath been shewed before in Deed, *supra* (a). And a feoffment, gift, grant, or lease, and the estate thereby made, may become void by forfeiture, or upon a breach of a condition, or by a limitation. For which see *Condition* and *Uses*. Also they may become void by disagreement or refusal: and this may be either by the disagreement of the party himself to whom it is made, or by the disagreement of another: of the party himself; for no estate can be made to a man of any thing in fee simple, for * life, or otherwise, against his will: and therefore, by the disagreement or refusal of it, the estate itself, and the deed whereby it is conveyed, may become void: by the disagreement of another; as the husband, in case of a feoffment, &c. made to his wife, may by disagreement avoid it. And for the first of these the law is thus, that all such acts as give estates directly or by way of use are good at first; and the thing granted, when the deed of grant is delivered to his use, shall vest in the grantee, before he hath notice of the grant, or agree to accept of the thing granted; so that if lands be limited to a man by way of use, or granted immediately by feoffment, gift, grant, or lease, or goods or chattels be given or granted to a man; in these cases, the things granted shall be said to be in the grantee, and the grant good, before notice and agreement, until disagreement (b). And before agreement the grantee may waive it, and so avoid the estate, and the deed also whereby the estate is made. And if it be but a lease for years that is made; he may waive and avoid that by word of mouth in the country (c), as well as a gift of goods, or an obligation delivered to his use. But if it be an estate of freehold that is made by feoffment, &c. it seems he cannot waive and avoid that but in a Court of Record (d).

Co. 3. 26. 27.
5. 119.
Doct. & Stud.
119.
Perk. sect. 44.
45. Fitz.
Done 4. 5.
Bro. Done 29.
30. 59.

When

(a) See *supra*, page 53, note (l).

(b) On the subject of disclaimer, see *supra*, page 53, note (l).

(c) Since the Statute of Frauds, a lease in writing, for a term exceeding three years, (the statute requiring such a lease to be in writing) cannot, it is conceived, be disclaimed by parol. And if the rule, *unum quodque dissolvitur eo modo quo collegatur* is applicable to such a case, as it is presumed it is, then even a lease which the statute does not require to be in writing, but which in fact is in writing, can only be disclaimed by an instrument in writing.

(d) *Butler and Baker's case*, 3 Co. Rep. 26, seems to be an authority for this opinion. But in the case of *Townson v. Tickell*, 3 Barn. & Ald. 31, it was held, that an estate of freehold given by will, may be disclaimed by deed *in pais*. According to the maxim, *unum quodque dissolvitur eo modo quo collegatur*, perhaps it might be contended, that wherever an estate is created by matter of record, that there it should be disclaimed by matter of record; but where it is created by instrument *in pais*, that there it may be disclaimed by deed *in pais*. Where one of two or more trustees disclaims the trust estate [it is otherwise where he releases] the others may perform the trust as if he was dead. See *Crewe v. Dickin*, 4 Ves. 97. On the subject of disclaimer by executors to whom a power of sale is given, see Sngd. Pow. 156, and Thom. Co. Litt. 398.

Co. super
Lit. 204.
Plow. 134.
15 E. 4. 4.
Dier, 76.
9. E. 4. 20.

When the cause of a grant faileth and the thing granted is executory, the grant is become void. As if one grant an annuity for an acre of land, for tithes, or for counsel; in this case *pro* is conditional, and therefore if the land be evicted by an elder title, or the grantee disturbed in the tithes, or he refuse to give counsel, the annuity is determined. But if a feoffment, or lease for life, or years, be made of an acre of land *pro una aera, &c.* as in the case before; albeit the acre be evicted, &c. yet the grant in this case of the acre of land is good (e). And if one grant an annuity for counsel; if the grantee will not give counsel, the grant is not of force. So if one grant to make new pales in the place for the old pales; if in this case he cannot have the old pales, it seems the grant shall not bind him to make new pales. So if one grant a rent for a way; stop the way, and the rent shall be stopped (f).

Co. 8. 144. 145. If one that hath a lease for life or years, of the manner to which an advowson is appendant, grant the next avoidance that shall happen during the lease, or grant a rent out of the manor, and then surrender the manor so that his estate is gone; in this case notwithstanding, the grant of the next avoidance, and of the rent, doth continue good; and the grantee shall enjoy it according to the grant, as long as the estate that is surrendered should have had continuance (g).

If the heir of the King's tenant enter and make a lease before livery sued, and after an intrusion is found against him; by this it seems the lease is avoided. So if tenant in tail make a lease warranted by the statute, and after dieth without issue; by this the lease is determined (h).

Co. super
Lit. 349.

If a tenant in tail make a feoffment to his heir within age, and he, after he is of full age, make a lease for years of the land, and after the tenant in tail dieth, and the heir is remitted; the lease in this case is not avoided.

• P. 286.

If

(e) To constitute an exchange, in the technical sense of the term, the word *exchange* must be made use of in the feoffment or other conveyance. Where the word *exchange* is not made use of, the deed will not, technically speaking, operate as an exchange, and consequently will not give the party who may be evicted a right of re-entering upon his own lands. The case therefore put, in the text, of a conveyance of one acre for (or in consideration of) another, not being properly an exchange, the doctrine of re-entry upon eviction does not apply to such a case.

(f) It is to be collected from what is stated in the text, that where the consideration or thing to be paid or given by one party, is to be paid or given in *futuro*, and the thing to be paid or given by the other, is also to be paid or given in *futuro*, that the ceasing to pay or give on one side, will exempt the other party from paying or giving on his; so that if the consideration on one side fails or ceases, that on the other shall cease also. But if the consideration on one side is something paid or given in *presenti*, whilst that on the other is something to be paid or given in *futuro*, will the failure of the consideration which is to be paid or given in *futuro*, entitle the party who was to receive it, to have again what he had paid or given in *presenti*?—as, for instance, if one conveys lands in consideration of an annuity, or counsel, if the annuity should be no longer paid, or the counsel no longer given, would the other party have a right to re-enter upon the lands? It is conceived he would not. And if, instead of lands the consideration given in *presenti* should be money, it is apprehended he could not, (at least, not at law) recover any part of it back again. [If there was a covenant for paying the annuity, giving counsel, &c. he might sue on such covenant.]

(g) The lessee, by the surrender, can only part with such interest as he has left after he has charged the premises with the rent, &c. So if he makes an under-lease and then surrenders the original, the under-lease remains good. If indeed the rent or under-lease which the lessee grants, only affects the premises in *equity*, whilst the surrender operates upon the *legal* estate, and if the surrender is made for a valuable consideration and without notice to the surrenderee of the grant of the rent or under-lease, in that case, the rent or under-lease cannot be supported against the surrenderee. For further information relative to the surrender of an original lease where the under-lease has been granted, see the Chapter on Surrenders.

(h) *Quare* of this, and see *supra*, page 280, note (q).

If an annuity be granted to one until he be advanced to a benefice by the grantor, and the grantor die, and the heir or executor of the grantor tender a benefice; it seems this will not determine the grant (i). Plow. 272.
15 H. 7. 1.

If *A.* be lessee for years of an advowson, and grant the next avoidance to *B.* if it shall happen to become void during the term, and *A.* doth surrender the term to *C.* who hath the inheritance, and the church become void before the end of the term; in this case, the grant is good to *B.* and he shall have the next avoidance, for a man cannot derogate from his own grant. So if *A.* be lessee for years, and he grant a rent-charge to a stranger; and after surrender his term to the lessor; in this case, albeit the term be extinct, yet the rent doth continue, and the stranger shall have it during the term. So if *A.* have a rent-charge out of the land of *B.* and acknowledge a statute to *C.* and then release the rent to *B.* in this case, albeit the rent be gone as to *A.* and *B.* yet it is in esse as to the conusee, and he may extend it (k). Co. 8. 145. 7.
39.

If a man be seised of a great wood, and grant to *I. S.* six hundred coards of wood out of the same wood, to be taken by the assignment of *A.* in this case, if *A.* will not upon request assign where the wood shall be taken, yet the deed will not loose its effect, but *I. S.* may take it without assignment. Co. 5. 24.

If *A.* be lessee for life on condition to have fee, and he make a lease to *B.* for years and after he perform the condition, and so his estate for life is turned into a fee simple; in this case, the lease for years is good still notwithstanding: but otherwise it is in case of the King. Co. 7. 14.

If *A.* tenant in tail enfeoff *B.* on condition to the use of *A.* in fee, and *A.* had granted a rent-charge or acknowledged a statute, which by the statute of 1 R. 3. cap. 5. was extended, and after *A.* had performed the condition; in this case, albeit the estate had been changed, yet the interest of the grantee or conusee had continued. Co. 1. 147.
148. 11 H. 7.
21.

If *A.* be tenant for life, the remainder to *B.* in tail, the remainder to *A.* in fee, and *A.* doth grant a rent-charge or acknowledge a statute and die; in this case and hereby, the grant is not become void; but if *B.* die without issue, the heir of *A.* shall be charged (l). 5 Ed. 4. 2.
Pethose and
Crane's case,
Mic. 56. 37.
El. Co. B.

If a corody be granted for a service to be done, the omission of the service doth determine the corody. Davis Rep. 1.

If one grant lands with his daughter in frank-marriage, or goods with his daughter in marriage, and after the marriage is dissolved, and * they are divorced (m); in this case the

• P. 287.

(i) Unless it was clear, that the annuity should not cease except the presentation to the benefice was made by the grantor of the annuity and no other, it can hardly be doubted but it would cease in the case put in the text, viz. upon the grantor's heir tendering a presentation; or at any rate equity, it is conceived, would restrain the grantee from enforcing payment of the annuity after the benefice had been tendered to him by the grantor's heir.

(k) On the principle mentioned *supra*, page 285, note (g).

(l) That is, supposing *B.* not to have suffered a recovery, and thereby to have destroyed the reversion in fee.

(m) A jointure is not forfeited by the jointress being divorced, or by elopement with an adulterer. See Treat. on Marri. Sett. page 512.

the grant is now become of no force: *Cessante causa cessat effectus*.

Bro. Grant.
103.

If one man grant to another an office of charge only, to which there is no benefit or fee incident; in this case, he may avoid and determine his own grant at his pleasure, without any cause given. But if there be any fee or profit incident to the office, then he may not avoid the grant of it, or put out the officer, without some cause of forfeiture: and if he do the grantee may have an assise. And yet in this case also he may put him out of the office, albeit he may not deprive him of the fee or profit incident thereunto (a).

2. Where a man may avoid his own grant: or not: and when.

Bro. Grant.

If one grant a ward to another to marry, or for his service; it seems he may not afterwards avoid this grant. But if one grant him to another for instruction or education, *contra*.

Bro. Grant.
128.

If one make a lease for years of his land rendering rent, and after grant the rent to *I. S.* and the termor attorn, and after the lessor accept of a surrender of the estate of the termor; yet this doth not avoid the grant of the rent, but the same shall continue still.

Lit. sect. 477.

If a disseisor grant a rent, common, or other profit appender out of the land, and after the disseisee doth enter and infeoff him of the land; in this case, the rent is avoided, and the common is gone. But if the disseisee release to the disseisor; in this case, he shall not avoid his own grant.

An infant, and other disabled persons, may impeach and avoid their own grants in divers cases, which see before in *Grant* (o).

A deed of feoffment, &c. in some cases is holpen, and a fault therein cured, by the making of livery of seisin. For which see *Feoffment* and *Lease*. But an attornment will not help the grant of a reversion, &c. for it is a maxim in law, that attornment cannot make a void grant good (p).

3. Where and by what means a feoffment, gift, grant, or lease, or the estate thereby made, being void or voidable at the first, may become good by matter *ex post facto*: or not.

Co. 1 Capel's case.
Dier, 373.
Co. 1. 48. 76.

If a tenant in tail make a lease for life, or years, of land, and this lease is voidable, and after the tenant in tail doth suffer a common recovery of the land, to whomsoever it be; by this the lease is affirmed and made good during the term, as well against the issues and heirs by the entail, as against him in reversion or remainder: and so it is of a charge of a rent upon the land. And if tenant in tail make a lease of the land or charge it, and after levy a fine of the land to a stranger, by this the lease or charge is become good against the issue in tail also (q).

If

(a) If a man grant another any privilege or easement, as a right of way through his lands, but without granting it for any certain period, he may avoid the grant when he pleases.

(o) See *supra*, pages 7, note (u), 9, note (b), 204, note (g), 268, note (h), and *infra*, page 289, note (u), on the subject of grants, fines, feoffments, leases, &c. by infants; and *Treatise on Marriage Settlements*, page 11; relative to settlements or articles made by infants upon marriage.

(p) Attornment rendered necessary by the act of the 4 & 5 Ann. c. 16.

(q) Not unless the fine was duly levied with proclamations. See *supra*, page 20, notes (m) and (o). on the subject of affirming former grants and letting in incumbrances by levying fines and suffering recoveries; and see the case of *Eick v. Welsh*, 1 Wils. Rep. 276, where the Court resolved, that if tenant in tail makes a lease or mortgage for years, or charges the land with any other incumbrances, and afterwards suffers a common recovery, that it shall let in all such incumbrances.

If a tenant in tail make a lease for forty years rendering rent and die, and his issue doth lease to another by indenture for twenty-one years rendering rent, to begin after the expiration, forfeiture, or surrender of the first lease; it is said this doth affirm the first lease. *Sed quære* (r).

So held in the
Exchequer.
Hil. 16. Jac.

Acceptance of rent reserved on a lease for life or years, which is voidable only and not void, may make the lease good.

• P. 288.

• A feoffment, gift, &c. that is made by duress or menace, and therefore voidable, may by another deed of defeasance, afterwards made between the same parties, become good. Bro. Defeasance 17.

Also grants, leases, and the estates thereby made that are not good, may be made good and perfected by release and confirmation. For which see *Release* and *Confirmation*.

4. Where and when a feoffment, gift, grant, or lease may be good for one time, and void for another, and good against one person but void against another; and good in part: and void in part: or not.

A feoffment may be good against some persons, and void against others, but cannot cease and revive and be good and void at several times; as a lease for years, or a grant of rent, &c. may in many cases; for a grant may be suspended, and a lease for years may cease and revive again: as if tenant in tail make a lease for years, rendering twenty shillings rent, and after taketh a wife and dieth without issue, and he in reversion or remainder endoweth his wife (as he may;) in this case, the lease, as against the woman, is revived, albeit it be void as to him in reversion or remainder. So if tenant in tail make a lease for years and die without issue, his wife *except* with a son, and he in reversion enter, and after the son (being heir to the entail) is born; in this case, the lease which was before avoided by him in reversion, if it be such a lease as is warrantable by the statute, is good against the issue in tail, and therefore is revived again. So if the King make a gift in tail to W. to hold by Knights service, and W. doth make a lease to A. for thirty years reserving rent, and then W. dieth, his son and heir of full age; in this case, as to the King, this lease is void, but after livery sued out, the lessee may enter again; and if the issue accept the rent, the lease is affirmed. So if tenant in tail make a lease not warranted by the statute and die, and his heir is in ward; in this case, the guardian in the behalf of the heir may avoid the lease during the wardship: but afterwards the heir may affirm it again, if he accepts of the rent (s). So if tenant in fee-simple take a wife, and then make a lease for years and dieth, and the

Co. super
Lit. 46. 7. a.

wife

(r) See *supra*, page 284, note (r), relative to the affirmance of voidable leases.

(s) If a lease, voidable by the issue in tail, is once actually avoided by such issue, it can never be set up again either by the party avoiding it, or by any future issue in tail. With respect to leases voidable by issue in tail, it may be proper to observe, that though such a lease may be avoided by the issue, yet it is held, that the privilege of avoiding it is personal to himself; and that if he alienates the estate, the alienee cannot avoid it, except in the case of a lease not made to commence in possession till after the completion of the alienee's title. With respect, however, to a lease which does not commence in possession till after the completion of the alienee's title, such a lease will probably, in most cases be actually void against the issue in tail, and not merely voidable, and consequently must be also void against his alienee. With respect to such leases by tenant in tail as are void against the issue, and such only as are voidable, it may be observed, that leases by tenant in tail, which commence, or by possibility may commence in his own life-time, (so that they either distinctly do, or possibly may, arise out of his own title or interest) are only voidable by the issue; but leases by tenant in tail, which by their very creation are not to commence till after his death, are actually void against the issue. See *Griffin v. Stanhope*, Cro. Jac. 455. *Mackett v. Clarke*, 2 Ld Raym. 778. Leases by tenant in tail, not made according to the statute of the 32 Hen. 8. ch. 28, are not binding upon the issue. See *supra*, page 277.

wife is endowed, she shall avoid the lease for her estate, but after her death the lease will be in force again. But if the patron grant the next avoidance, and after the Parson, Patron and Ordinary, before the statutes, had made a lease of the glebe for years, and after the Parson had died, and the grantee of the next avoidance had presented a Clerk to the church, who had been admitted, instituted, and inducted, and had died within the term, and the Patron had presented a new Clerk to the church, who had been admitted, instituted, and inducted; in this case the lease had not revived again. No more than if a *feme covert* levy a fine alone, and the husband doth enter and avoid the fine, the estate shall revive against the wife after his death; for it is avoided as to her also as well as to the husband by his entry. See more in *Deed, supra, cap. 4. numb. 7.*

Where a feoffment, gift, grant or lease is voidable, in some * cases it may be avoided by the party himself that made it, and not by others, albeit they be privies, as heirs, executors, or administrators; and in some cases it is voidable by others, and not by the party himself; and in some cases it is voidable by the party himself and by others. And in some cases it is voidable only at some times; and in some cases it is voidable at all times: as for examples, an infant, if he grant by fine, must avoid it during his minority if he lives to be of full age, otherwise he himself or any other shall never avoid it (†). But if he grant by deed, this may be avoided at any time by himself, his heirs, executors, or administrators, or his guardian in his right, as the case is (u). But a lord by escheat cannot avoid a voidable estate made by his tenant being an infant. And if a woman covert do any such act by deed; it may be avoided by her husband during the coverture, or herself after the coverture, or her heirs, &c. that are privies after her

* P. 289.

5. Who may avoid a feoffment, gift, grant, or lease, that is voidable: or not? and how.

Infant.

Woman covert.

Co. super
Lit. 45.

Co. 7. 8.
Dier, 337. 239.

(†) See *supra*, page 7, note (u).

(u) In the case of *Zouch v. Parsons*, 3 Burr. 1794, it was held, that a conveyance by lease and release, by the infant heir of a mortgagee (such infant heir having no beneficial interest either in the land or mortgage-money, and being therefore a mere naked trustee of the legal estate) could not be avoided by the infant during his minority. And in the case of ——— v. *Handcock*, 17 Ves. 383, the Lord Chancellor expressed himself of opinion, that if a mere dry trustee made a conveyance during his infancy, equity would restrain him from setting it aside after he came of age. If, on the authority of the above cases, a conveyance of a dry legal estate, made by an infant, cannot be avoided at law during his minority; and if equity would restrain him from avoiding it after he came of age, there might be some ground for contending, that, in taking a conveyance from an infant trustee there is no occasion to resort to the act of the 7 *Anne*, c. 19. As, however, the infant might attempt after he came of age, to set his conveyance aside, and, consequently, as the party claiming under the conveyance would be put to the trouble and expence of applying to a court of equity to restrain him from setting it aside, a conveyance from an infant trustee can never be recommended except under the act of *Anne* *. If an infant does what he is compellable by law to do, he shall be bound by what he does. It was principally upon the authority of this doctrine that Lord *Mansfield* appears to have determined the case of *Zouch v. Parsons*. It is conceived, however, that the doctrine was totally inapplicable to the case; for a trustee, even an adult trustee, is not, by law, compellable to convey. It is only in equity that he is compellable to do so. And with respect to a conveyance by an infant trustee, it is merely by force of the act of *Anne* that he is bound to convey.

* *Quare*, would not the mere entry of the infant trustee after he came of age, avoid the conveyance made during his minority; and if so, how is a court of equity to restrain him from avoiding it?

Non sane memoria.

Tenant in tail.

Corporations.

her death (w). And if a man *non sane memoria* do any such act, it may not be avoided by himself that is the party denying it, but it may be avoided by his heirs, &c. that are privies (x). And if tenant in tail make a voidable lease not warranted by the statute, he may not avoid it himself, but his issue may (y). And if he be ward by reason of a tenure in *capite* or knight service, the guardian of the issue, during his time, may avoid it. And if a corporation spiritual, sole or aggregate, make leases not warranted by the statutes, they may not avoid it themselves, but their successors after their death, translation, or other remotion, may avoid it; or if a Bishop make such a voidable lease, the King, when the Bishoprick doth come into his hands, may avoid it.

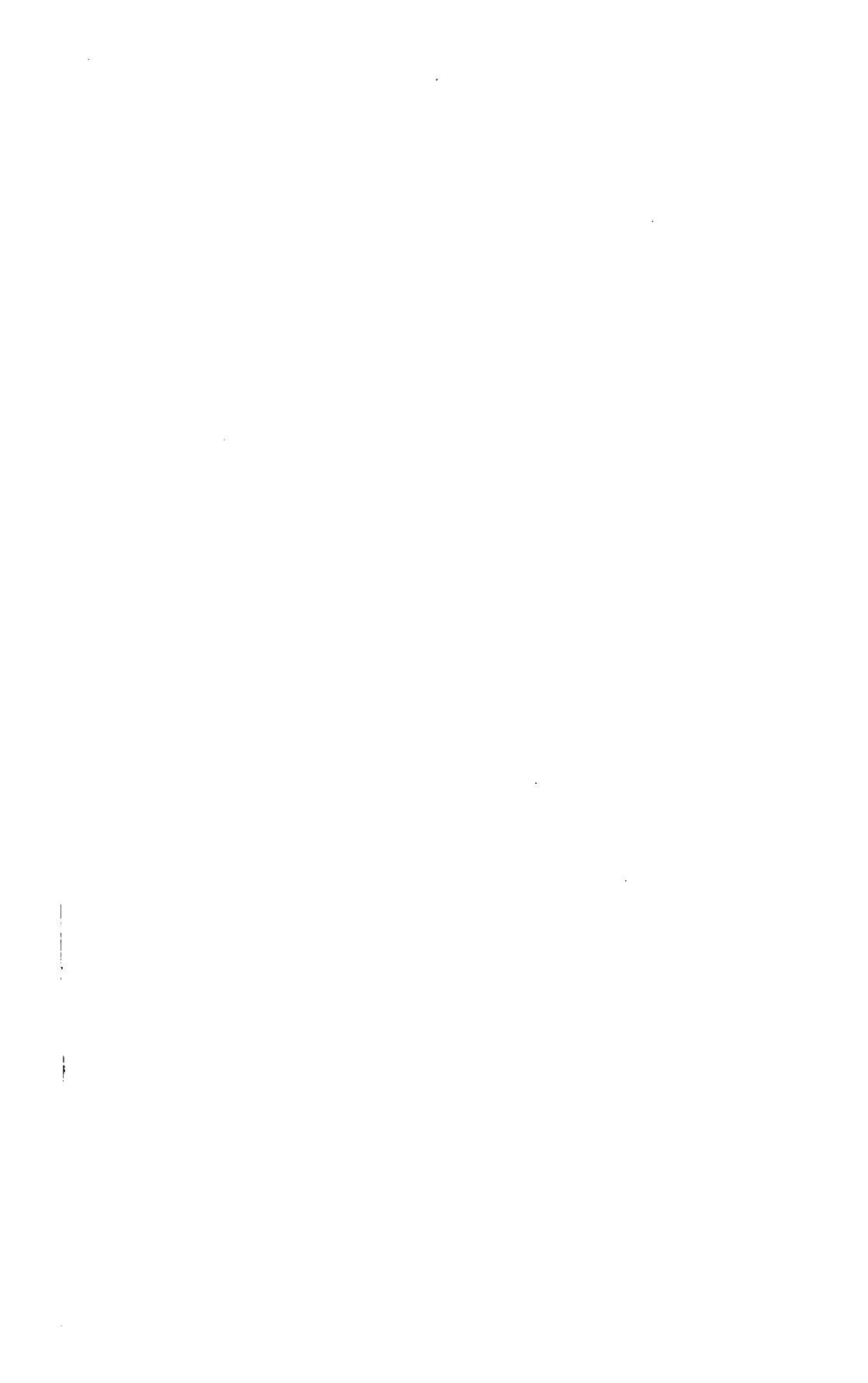
Co. super
Lit. 7. 8.

And now we pass to another sort of assurances, that are for some special purposes, and in some special cases only; wherein we shall first begin with an *Exchange*.

(w) See *supra*, page 7, note (w), on the subject of a feme covert levying a fine without her husband.

(x) See *supra*, page 56, note (c).

(y) That is, if the tenant in tail has not levied a fine with proclamations, or suffered a recovery, or if the issue in tail has not himself done some act to affirm the lease, on which subject see *supra*, page 46, note (u), and 284, note (r).



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